Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

AVAILABILITY OF BOUND VOLUMES

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notice

RECORDATION OF TRADE NAME: "J & J AMERICA, INC."

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of recordation.

SUMMARY: On July 19, 1988, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "J & J AMERICA, INC." was published in the Federal Register (53 FR 27258). The notice advised that before final action was taken on the application, consideration would be given to any relevant data, views or arguments submitted in writing by any person in opposition to the recordation and received not later than September 19, 1988. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "J & J AMERICA, INC." is recorded as the trade name used by J & J America, Inc., a corporation organized under the laws of the State of Florida, located at 11401 SW. 40th Street, Miami, Florida 33165.

The trade name is used in connection with the following merchandise manufactured in Korea: textiles; textile products; fabrics; ladies handbags; luggage; audio/visual equipment; televisions; video camera recorders; electronic accessories; sporting goods; womens fashion accessories and costume jewelry.

FOR FURTHER INFORMATION CONTACT: Bettie Coombs, Value Special Programs and Admissibility Branch, 1301 Constitution Ave., NW., Washington, D.C. 20229; (202) 566–5765.

Dated: October 31, 1988.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs and Admissibility Branch.

[Published in the Federal Register, November 9, 1988 (53 FR 45417)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 10 and 141

PROPOSED CUSTOMS REGULATIONS AMENDMENTS REGARDING THE IMPORTATION OF ETHYL ALCOHOL FOR NONBEVERAGE PURPOSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: The Bureau of Alochol, Tobacco and Firearms (BATF) has requested that Customs change certain procedures in its regulations concerning the withdrawal of ethyl alcohol from Customs custody and its transfer to the BATF bonded premises of a distilled spirits plant for nonbeverage purposes. These changes are intended to conform that portion of the Customs Regulations concerning such transfer procedures to existing BATF transfer procedures. The changes will generally delete obsolete procedures regarding the transfer of nonbeverage ethyl alcohol and references to obsolete forms from the Customs Regulations and will incorporate, in the Customs Regulations, references to the BATF Regulations which contain the details regarding the BATF transfer procedures. The changes will also conform the declaration filed in connection with the entry of ethyl alcohol for other than beverage purposes to the relative statutory requirements.

DATE: Comments must be received on or before January 9, 1989.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 2324, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Matters:

Louis Alfano, Office of Trade Operations, 202–566–8651.
John Holl, Office of Inspection and Control, 202–566–8151.

Audit Matters:

Matthew Krimski, Regulatory Audit Division, 202–566–2812.

Legal Matters:

Ken Paley, Entry Rulings Branch, 202–566–5856.

SUPPLEMENTARY INFORMATION:

Background

The procedures for the withdrawal of certain imported ethyl alcohol from Customs custody and their transfer to the BATF bonded premises of a distilled spirits plant, for nonbeverage purposes, without the payment of internal revenue tax pursuant to § 5232, I.R. Code of 1954 (26 U.S.C. 5232), are contained in § 10.99, Customs Regulations (19 CFR 10.99). These regulations contain detailed procedural instructions for the tax-free transfer of imported ethyl alcohol of 185 degrees or more of proof, which is classifiable for duty purposes under item 427.88, Tariff Schedules of the U.S. (19 U.S.C. 1202). The procedures contained therein are no longer current and the forms described are, in many cases, obsolete and unavailable. Difficulty has arisen because Customs officers, relying on the above regulatory authority, have been requiring these obsolete and unavailable forms. In addition thereto, the Internal Revenue Code has been revised since the distilled spirits transfer procedures were originally promulgated. The BATF authority for such transfer procedures is now contained in § 5232, I.R. Code of 1986 (26 U.S.C. 5232). Appropriate changes to the BATF Regulations were published as T.D. ATF–198 in the Federal Register of March 1, 1985 (50 FR 8456).

In considering this matter, Customs notes that the major substantive responsibility for imported nonbeverage alcohol as it enters the commerce of the U.S. lies with the BATF. Customs also notes the difficulty of keeping the procedures, which are essentially for BATF purposes, current in the Customs Regulations. We, therefore, have concluded that it would be more appropriate for these procedural matters to appear in detail in the BATF Regulations (27 CFR Parts 250, 251) as suggested by that Bureau, and that the Customs Regulations merely reference the BATF forms and procedures.

Proposed Action

It is proposed that the obsolete procedures regarding the transfer of ethyl alcohol for nonbeverage purposes from Customs custody to BATF custody be deleted from §§ 10.99 and 141.102 Customs Regulations (19 CFR 10.99 and 141.102), and references to the appropriate parts and subparts of the BATF Regulations, which now contain those procedures, be inserted in the Customs Regulations in lieu thereof.

It is also proposed to amend § 10.99(a), Customs Regulations (19 CFR 10.99(a)), to clarify that the importer's declaration to Customs supporting the tax-free transfer of imported ethyl alcohol must note whether the alcohol is to be used for fuel purposes, as well as stating that the alcohol is to be used for nonbeverage purposes. This change is being proposed pursuant to the Tax Reform Act of 1986 (§ 423, Pub. L. 99–514).

The proposed amendments to § 141.102(b), Customs Regulations (19 CFR 141.102(b)), would clarify the fact that the transfer of the nonbeverage ethyl alcohol to a distilled spirits plant from Customs custody is tax free but not duty free.

Comments

Before adopting this proposal, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2324, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, attention: Desk Officer for U.S. Customs Service, with copies to the U.S. Customs Service, Management Analysis and Systems Division, Washington, D.C. 20229.

The collection of information in this regulation is in § 10.99, title 19, Code of Federal Regulations. This information is required by the

U.S. Customs Service to ascertain whether ethyl alcohol imported for nonbeverage purposes may be transferred from Customs custody to the premises of a distilled spirits plant bonded by the Bureau of Alcohol, Tobacco and Firearms (BATF) of the Department of the Treasury. This information will be used to determine whether such transfer may be accomplished without the payment of internal revenue tax pursuant to § 5232, I.R. Code of 1986 (26 U.S.C. 5232). These changes will conform the Customs Regulations to changes made in the BATF Regulations which were published as T.D. ATF-198 in the Federal Register of March 1, 1985 (50 FR 8456). The likely respondents are business or other for-profit institutions and Federal agencies or employees.

Estimated total annual reporting and/or recordkeeping burden: 25 hours.

Estimated average annual burden per respondent and/or recordkeeper: 5 minutes.

Estimated number of respondents and/or recordkeepers: 300.

Estimated annual frequency of responses: 1.

Drafting Information

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 10

Art, Customs duties and inspection, Exports, Fisheries, Imports, Oil imports, Packaging and containers, Petroleum, Tobacco and Wildlife.

19 CFR Part 141

Customs duties and inspection, Explosives, Imports and Lawyers

Proposed Amendments

It is proposed to amend Part 10, Customs Regulations (19 CFR Part 10), as set forth below:

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10, as hereto pertinent, would continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Headnote 11), and 1624

2. It is proposed to revise § 10.99 to read as follows:

§ 10.99 Importation of ethyl alcohol for nonbeverage purposes.[90]

(a) If claim is made by an importer other than the United States or a governmental agency thereof for the classification of ethyl alcohol of 185 degrees or more of proof under item 427.88, Tariff Schedules of the United States,[91] the importer or his agent shall file in connection with the entry a declaration that the alcohol is to be used for nonbeverage purposes only and whether the alcohol is to be used for fuel purposes. Customs shall release the alcohol for transfer, under internal revenue bond, to a distilled spirits plant deposit of estimated duty, if any, and without the payment of the internal revenue tax upon receipt of a transfer record for bulk spirits. In addition, a package gauge record must be submitted to Customs if the alcohol is in packages, as specified in subpart I of Part 251, Bureau of Alcohol, Tobacco and Firearms (BATF) Regulations (27 CFR Part 251, Subpart I). The transfer shall be accomplished in accordance with subpart L of Part 251, Bureau of Alcohol, Tobacco and Firearms Regulations (27 CFR Part 251, Subpart L).

(b) An appropriate BATF permit shall be filed with Customs in connection with the withdrawal of ethyl alcohol from Customs custody by the United States or any governmental agency thereof for its own use for nonbeverage purposes. Such permit shall be filed before release under the entry without the deposit of estimated duties, if any, and internal revenue tax, or before release in accordance with the provisions of § 141.102(d) of this chapter. (See subpart M of Part 251, Bureau of Alcohol, Tobacco and Firearms Regulations (27 CFR Part 251, Subpart M)).

(c) The procedures for the withdrawal free of tax on the entry of ethyl alcohol for nonbeverage purposes from the Virgin Islands are found in subpart O of Part 250, Bureau of Alcohol, Tobacco and Firearms Regulations (27 CFR Part 250, Subpart O).

PART 141—ENTRY OF MERCHANDISE

1. The general authority citation for Part 141 and the specific authority of Subpart G thereof would continue to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624. Subpart G—19 U.S.C. 1505.

2. It is proposed to amend § 141.102 to read as follows:

§ 141.102 When deposit of estimated duties, estimated taxes, or both not required.

* * * * * * *

(b) *Bulk distilled spirits transferred to the bonded premises of a distilled spirits plant.* An importer may transfer distilled spirits in bulk to the bonded premises of a distilled spirits plant, without the

payment of tax, under the provisions of § 5232(a), Internal Revenue Code of 1986 (26 U.S.C. 5232(a)), and the regulations of the Bureau of Alcohol, Tobacco and Firearms (27 CFR Part 251).

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: July 26, 1988.
JOHN P. SIMPSON,
Acting Assistant Secretary for Enforcement.

[Published in the Federal Register, November 10, 1988 (53 FR 45485)]

U.S. Court of Appeals for the Federal Circuit

ERRATA

(Appeal No. 88–1076, 88–1107)

WASHINGTON RED RASPBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE OREGON CANEBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE NORTHWEST FOOD PROCESSORS ASSOCIATION, RED RASPBERRY MEMBER GROUP OF THE AMERICAN FROZEN FOOD INSTITUTE, RADAR FARMS, RON ROBERTS, SHUKSAN FROZEN FOODS, INC., WASHINGTON RED RASPBERRY GROWERS ASSOCIATION, AND NORTH WILLAMETTE HORTICULTURAL SOCIETY, PLAINTIFFS/APPELLANTS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND THE HONORABLE MALCOLM BALDRIDGE, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS/CROSS-APPELLANTS, AND ABBOTSFORD GROWERS CO-OPERATIVE UNION AND CHILLIWACK FRUIT GROWERS CO-OPERATIVE, DEFENDANTS

(Decided October 13, 1988)

Please make the following corrections to Appeal No. 88–1076, 88–1107, published in the CUSTOMS BULLETIN, Vol. 22, No. 44, dated November 2, 1988:

Page 13, footnote 28, lines 1 and 2, change "ITC" to read "ITA".

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–133)

SILVER REED AMERICA, INC. AND SILVER SEIKO, LTD., PLAINTIFFS, BROTHER INTERNATIONAL CORP. AND BROTHER INDUSTRIES, LTD., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, SMITH CORONA CORP. (F/K/A CONSUMER PRODUCTS DIVISION, SCM CORP.), DEFENDANT-INTERVENOR

SMITH CORONA CORP. PLAINTIFF *v.* UNITED STATES, DEFENDANT, SILVER REED AMERICA, INC., SILVER SEIKO, LTD., BROTHER INTERNATIONAL CORP., BROTHER INDUSTRIES, LTD., AND NAKAJIMA ALL CO., LTD., DEFENDANT-INTERVENORS

Consolidated Court No. 83–10–01522

Before NEWMAN, *Senior Judge.*

[Revised Final Results affirmed in part and remanded.]

(Dated October 7, 1988)

MEMORANDUM OPINION AND ORDER

Willkie Farr & Gallagher (*Christopher A. Dunn* and *Zygmunt Jablonski,* Esqs.) for Silver Reed America, Inc. and Silver Seiko, Ltd.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Jessica Wasserman,* Esqs.); *Robert E. Walton,* Esq., General Counsel for Smith Corona Corporation.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, Department of Justice (*Velta A. Melbrencis,* Attorney) for the United States; *Jean Heilman Grier,* Attorney Adviser, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel.

INTRODUCTION

NEWMAN, *Senior Judge:* On June 16, 1988 the International Trade Administration, United States Department of Commerce ("ITA"), issued its Revised Final Results of Antidumping Duty Administrative Review of Portable Electric Typewriters ("PET"s) from Japan ("Revised Final Results") pursuant to this court's remand, *Silver Reed America, Inc. and Silver Seiko, Ltd.* v. *United States,* 12 CIT ——, 679 F. Supp. 12 (1988), *rev'd in part and remanded on other grounds,* 12 CIT ——, 683 F. Supp. 1393 (1988). Plaintiffs Silver Reed America, Inc. and Silver Seiko, Ltd. (collectively "Silver") challenge

various aspects of the Revised Final Results. Silver, the United States and Smith Corona Corporation have submitted briefs commenting on the Revised Final Results.

For the reasons that follow, the Revised Final Results are affirmed in part and remanded.

In its prior remand, the court directed ITA to correct errors regarding the deduction of imputed currency exchange rate losses from the United States Price and the double-counting of certain interest costs. Additionally, the court requested ITA to reconsider Silver's claim for a level of trade adjustment and to further articulate the agency's rationale for rejecting the evidence Silver proffered on that issue.

In its Revised Final Results, ITA: (1) recalculated the adjustments to United States Price to exclude from indirect selling expenses the amount previously included for imputed currency exchange rate losses;[1] (2) corrected an error in deducting imputed interest expenses from United States Price; (3) corrected a clerical error found in reviewing a computer printout used in the first administrative review; and (4) again rejected Silver's claim for a level of trade adjustment.

Silver contests the Revised Final Results, and asserts: (1) ITA's correction of the double-counting of indirect selling expenses was erroneous in that ITA incorrectly characterized Silver Reed's actual borrowings used to finance inventory as direct credit costs when it should have considered them as the exclusive indirect selling costs associated with the purchase of inventory prior to resale; and (2) ITA's refusal to grant an adjustment for differences in levels of trade is not based on any evidence in the record.

The court affirms ITA's Revised Final Results except for its refusal to grant Silver a level of trade adjustment.

Double-Counting of Interest Costs

ITA reports in its Revised Final Results that in reviewing pertinent portions of the administrative record to determine whether there was any double-counting of adjustments to Exporter's Sales Price ("ESP"), the agency found that it had double-counted interest costs. Revised Final Results, at 2–5; deft's brief, at 3. While Silver admits that ITA has eliminated the double-counting of interest costs (Silver's brief, at 2), Silver insists that ITA's position is wrong on the facts regarding whether Silver Reed incurred borrowings to permit it to pay Silver Seiko for the PETs shipped from Japan.

It appears that ITA deducted, as Silver Reed's "direct" cost of credit, the cost of Silver Reed's actual borrowings from U.S. banks. ITA also imputed an "indirect" credit cost for the period that

[1]While ITA treated the expenses in issue as currency exchange losses, intervenor contends that, absent verification by ITA, such expenses should be treated as expenses incurred by Silver Reed in currency hedging and deducted from Exporter's Sales Price pursuant to 19 U.S.C. § 1677a(e)(2). However, intervenor has pointed to nothing in the record establishing its contention or warranting a further remand on the issue of currency exchange rate losses.

Silver's PETs were held in inventory. While ITA has corrected the double-counting of interest costs that concededly occurred, Silver continues to dispute ITA's interest calculations concerning the nature of the costs incurred.

In essence, Silver Reed claims the record shows it borrowed funds from U.S. banks whenever it had to pay Silver Seiko for the inventory of PETs it purchased. Consequently, argues Silver, these costs were "indirect" costs used to reimburse the parent company for merchandise Silver Reed held in inventory and these costs had no direct relationship to Silver Reed's resale of the merchandise.

Hence, according to Silver, ITA "got it[s] [interest calculations] exactly backwards" (Silver's brief, at 7), *viz.*: ITA deducted actual borrowings as a *direct* credit cost and imputed an interest cost for the "indirect cost" of inventory holding, whereas ITA should have deducted Silver Reed's actual borrowings as the exclusive indirect cost of holding inventory and imputed a direct credit cost only for the period between Silver Reed's resale and its receipt of payment from its customer. Silver Reed further maintains that since it "did not and could not know whether particular merchandise was resold at the moment it borrowed funds to repay Silver Seiko, those borrowing costs *had to have been indirect* selling costs rather than direct selling costs" (Silver's brief, at 7, emphasis in original).

The record establishes that Silver Reed did not finance its inventory by borrowing funds, but rather shows that its actual borrowings were incurred after Silver Reed's merchandise had already been resold in order to finance extended payment terms to its United States customers. Therefore, ITA's imputation of credit costs for the prepayment period was correct, and its use of actual credit costs for the period between sales by Silver Reed to its customers and repayment by those customers was similarly correct.

In sum, the court finds that ITA's recalculation of indirect and direct interest costs is proper and Silver's request for a further remand on this issue is denied.

Level of Trade

During the administrative review, Silver claimed a circumstance-of-sale adjustment under 19 U.S.C. § 1677b(a)(4)(B) and 19 C.F.R. § 353.19 to account for the fact that Silver Seiko's U.S. purchase sales[2] were compared with home-market sales at a different level of trade. The purchase price sales were made directly to wholesale distributors (*i.e.,* original equipment manufacturers) in the United States, while the comparison sales in Japan were made exclusively to retailers through Silver Seiko's related selling subsidiary, Silver Business Machines ("SBM"). Silver claimed that the difference in selling costs relating to the different levels of trade in the two mar-

[2]Silver Seiko engaged in both Exporter's Sales Price sales to its related-party subsidiary in the United States (Silver Reed) and Purchase Price sales to its unrelated U.S. customers. The level of trade issue concerns Silver Seiko's Purchase Price sales in the United States.

kets were the additional expenses incurred by SBM in selling to Japanese retailers rather than selling directly to wholesalers. Thus, because ITA used the home-market sales to retailers for comparison with the purchase price sales to United States wholesalers, Silver argues that the additional expenses incurred by Silver Seiko in selling beyond the wholesale level in Japan (*i.e.*, SBM's expenses) should have been deducted from the home-market prices pursuant to 19 C.F.R. § 353.19.

In the Final Results of the first administrative review, ITA denied Silver's claim for a level of trade adjustment assertedly because, *inter alia*, "Silver Seiko did not adequately demonstrate that the difference in cost between the two markets is due to a difference in level of trade." 48 Fed. Reg. at 40764–65. Ostensibly, then, ITA does not dispute that Silver Seiko's home market sales to retailers (through SBM) and its United States sales directly to wholesale distributors were at different levels of trade, nor that there were cost differences in selling PETs in the two markets.[3] In remanding the action, the court directed ITA to fully explain its position that "Silver Seiko did not adequately demonstrate that the difference in cost between the two markets is due to a difference in level of trade," and to specifically disclose wherein Silver failed in its proof in this matter. 679 F. Supp., at 20. ITA did comply with the remand order in those aspects.

ITA, in the Revised Final Results, reaffirms its "determination that Silver has not met its burden of providing a sufficient basis for a level of trade adjustment." Revised Final Results, at 6. According to ITA, Silver had the burden of establishing that the difference in price between the United States sales and home-market sales is attributable to a difference in the levels of trade rather than simply to differences resulting from disparate market conditions in two distinct markets. *Id.*, at 7–8. Further, ITA contends that "[a]n adjustment cannot be made for differences in level of trade just because costs are different when comparing sales to the United States and sales in the home market." *Id.* at 8, quoting from "*Final Determination of Sales at Less Than Fair Value; Certain Internal-Combustion, Industrial Forklift Trucks from Japan,* 53 Fed. Reg. 12552, 12576 (Comment 86) (April 15, 1988)." And ITA further commented:

> In order to determine whether differences in level of trade affect price comparability, it is necessary to compare what those differences would be *within the same market.* Absent evidence establishing differences within the same market, it is not possible to determine that cost differences between two different trade levels in two different markets are not merely the result of differing economic conditions in the two markets. In order to make an accurate comparison, it is necessary to compare sales

[3]Defendant also does not dispute Silver's contention that ITA verified and accepted Silver's calculation of costs. *See* First Silver Seiko Verification Report at 13, A.R. 2819; Second Silver Seiko Verification Report at 8–9, A.R. 5295–96.

> at different levels of trade, or else the comparisons are meaningless.
>
> To qualify for a level of trade adjustment, Silver would have to demonstrate that it incurred different selling expenses in selling to different levels of trade in the home market, *i.e.*, retailers and wholesalers. Since Silver did not make sales to wholesalers in the home market during the review period, the Department could not make an appropriate comparison of different selling expenses at different levels.

Id. at 11 (emphasis in original). Specifically, as erroneously found by ITA, Silver failed in its burden of proof in that "Silver simply supplied information which showed that the cost of distributor sales in the U.S. was different from the cost of retail sales in Japan * * * [and] [t]his data does not establish what the price differences between the two levels within Japan would have been." *Id.*, at 10.

Silver strenuously disputes that it "simply supplied information" showing that the cost of distributor sales in the United States was different from the cost of retail sales in Japan. Essentially, Silver stresses that, in conformity with ITA's standard of proof, Silver quantified the difference between the cost of selling to a wholesale distributor *in Japan* (*i.e.*, SBM) and the cost of selling to retailers *In Japan*. Silver's brief, at 3.

Since ITA compared Silver Seiko's sales to its United States distributors with SBM's sales to unrelated retailers in Japan, Silver concedes that it had the burden of showing what its sales price would have been in Japan to an unrelated distributor. Silver claims that it sustained such burden of proof "by taking SBM's resale price to retailers and backing out SBM's *cost of resale*" (A.R. 6676–77). Silver's brief, at 3–4 (emphasis in original). In essence, Silver maintains that it proved what the maximum price of selling to an unrelated distributor in Japan would have been and that ITA verified the amount of the resale costs. *Id.*

Defendant and intervenor advance the *post hoc* rationale that Silver improperly relied upon the costs of selling to retailers through its related distributor in Japan as a reliable measure of the actual selling expenses that would have been incurred by Silver Seiko in selling to an unrelated distributor in the home market.[4] The court concludes, however, that the relationship between Silver Seiko and SBM does not, standing alone, disqualify Silver's proof of its home market selling expenses for purposes of establishing a level of trade adjustment. Moreover, ITA's findings that (1) "Silver offered its cost of distributor sales in the United States as evidence of what costs at that same level of trade would have been in Japan" (Revised Final Results, at 10), and that (2) "Silver simply supplied information which showed that the cost of distributor sales in the

[4] Fundamentally, of course, *post hoc* rationalizations of Government counsel may not be relied upon to uphold agency action. *SCM Corp.* v. *United States*, 4 CIT 7, 11 n.4, 544 F.Supp. 194, 198 n.4 (1982).

U.S. is different from the cost of retail sales in Japan" (*Id.*) are patently lacking in substantial evidence on the record.

Notwithstanding that 19 U.S.C. § 1677b(a)(4) requires an adjustment to foreign market value only "if it is established to the satisfaction of the administering authority that the amount of any difference between United States price and the foreign market value * * * is wholly or partly due to * * * other differences in circumstances of sale," ITA's broad discretion to determine whether a factor or condition of sale warrants an adjustment in foreign market value must be exercised reasonably and in a non-arbitrary manner. *Sonco Steel Div., Ferrum, Inc.* v. *United States,* 12 CIT ——, Slip Op. 88–109 (Aug. 18, 1988). The court recognizes that although Silver had the burden of demonstrating entitlement to a level of trade adjustment, the court finds that under the circumstances presented herein, ITA has exercised its discretion under section 1677b(a)(4) in an unreasonable manner.

Inasmuch as Silver Seiko's United States sales were made to wholesale distributors (original equipment manufacturers), Silver's claim for a level of trade adjustment subsumed that Silver did *not* have sales in Japan to an unrelated wholesale distributor. On this score, the court must agree with Silver that if Silver had made sales in Japan to an unrelated wholesale distributor, a level of trade adjustment would have been entirely inappropriate since ITA would have simply compared sales in the two markets at the same level of trade, as required by 19 C.F.R. § 353.19. Therefore, defendant's rejection of Silver's proof merely because Silver Seiko sold to retailers in Japan through its related distributor (SBM) imposes a "catch-22" burden of proof on Silver that makes it virtually impossible for Silver to qualify for a level of trade adjustment. Such unreasonable burden of proof must be rejected.[5]

Silver amply demonstrated to ITA that its home market sales to retailers through SBM incurred additional selling costs *vis-a-vis* "Silver's United States sales to wholesale distributors, and significantly, Silver's selling costs were verified by ITA (*see* n. 3, *ante*). ITA has not expressly considered the forgoing facts in the Revised Final Results. Under these circumstances, the interests of justice require that the level of trade issue be again remanded to ITA for reconsideration of whether Silver's evidence has reasonably quantified the difference in its selling costs in the two markets due to the difference in the levels of trade.

Conclusion

ITA's Revised Final Results are affirmed in all respects excepting its denial of a level of trade adjustment. With respect to that limit-

[5] The court also rejects intervenor's *"post-hoc"* contention that Silver is not entitled to a level-of-trade adjustment since "Silver failed to show that the expenses [of SBM] were directly related to distributor-level sales and not simply to overhead of SBM, incurred regardless of the level of trade." Intervenor's brief, at 4.

ed issue, this action is remanded to ITA for its reconsideration of Silver's evidence consistent with the views expressed herein.

ITA's new Revised Final Results shall be reported to the court within thirty days after the issuance of this order. If any party wishes to challenge these new Revised Final Results, it shall confer with opposing counsel and submit a briefing schedule within ten days of the report to the court.

(Slip Op. 88–134)

BELFONT SALES CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–12–01724–S

OPINION & ORDER

[Defendant's motion for leave to file a corrected certificate of service granted; defendant's motion for retrial or rehearing dismissed; and defendant's contingent motion for extension of time to file notice of appeal granted.]

(Dated October 11, 1988)

Stephen R. Sosnov for the plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*James A. Curley*) for the defendant.

AQUILINO, *Judge:* Entry of judgment in this case in accordance with the court's slip op. 87–90, CIT ——, 666 F. Supp. 1568 (1987), has spawned four related motions by the defendant, the primary one of which prays for "modification and amendment of the judgment * * * and for reconsideration and/or rehearing or retrial."

I

Slip op. 87–90, familiarity with which is presumed herein, set forth the court's findings of fact and conclusions of law after trial, including a finding that a quartz analogue watch or "QAW" does contain a watch movement, when viewed in the light of *Texas Instruments, Inc.* v. *United States,* 82 Cust. Ct. 272, C.D. 4810, 475 F. Supp. 1183 (1979), *aff'd,* 620 F.2d 269 (CCPA 1980); *Texas Instruments Inc.* v. *United States,* 82 Cust. Ct. 287, C.D. 4811, 475 F. Supp. 1193 (1979), *aff'd,* 620 F.2d 272 (CCPA 1980); and *Texas Instruments Inc.* v. *United States,* 1 CIT 236, 518 F. Supp. 1341 (1981), *aff'd,* 673 F.2d 1375 (CCPA 1982). The QAWs in the case had been classified under TSUS item 715.05 ("Watches"), with duties assessed pursuant to items 716.27 or 716.29 under the heading

> Watch movements * * * Not adjusted, not self-winding (or in a self-winding device cannot be incorporated therein), and not

> constructed or designed to operate for a period in excess of 47 hours without rewinding.

That heading, however, led the court to conclude that, in contrast to the Tariff Act of 1930,

> Schedule 7 of the TSUS directly tied the watch-movement provisions not only to "constructed or designed to operate for a period in excess of 47 hours without rewinding" per item 719, but also to "not constructed or designed to operate for a period in excess of 47 hours without rewinding" per the heading to the items apposite herein * * * and apparently precluded the classification under those provisions of watches that are rewound.[1]

The defendant argues in the main in its present motion for rehearing that the fact that the QAWs are not susceptible to winding or rewinding does not prevent their classification under items 716.27 or 716.29 and that electrically-powered watch movements had been classifiable under paragraph 367 of the 1930 act and that subsequent legislative history shows that Congress intended those movements to continue to be classified under TSUS item 716, a counterpart of the earlier paragraph.

These points, however, were made by the defendant and carefully analyzed by the court at the time of trial, a fact admitted now by the defendant[2] which nonetheless contends that

> [a]fter extensive further research it appears that the Court's construction of the language of the heading is contrary to the intent of Congress and inconsistent with appellate court decisions which have construed similar provisions with negative limitations of the sort found in the heading.[3]

But the purpose of a rehearing is not to relitigate. *See, e.g., BMT Commodity Corp.* v. *United States,* 11 CIT, ——, ——, 674 F. Supp. 868, 869 (1987). Rather, a rehearing is a

> method of rectifying a significant flaw in the conduct o[f] the original proceeding. *W.J. Byrnes & Co.* v. *United States,* 68 Cust. Ct. 358, 358, C.R.D. 72–5 (1972). The exceptional circumstances for granting a motion for rehearing are well established:
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>> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available at the time of trial; or (4) an occurrence at trial in the nature of an accident or an unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case.
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> *North Am. Foreign Trading Corp.* v. *United States,* 9 CIT 80, 80, 607 F. Supp. 1471, 1473 (1985), *aff'd,* 4 Fed. Cir.(T) 43, 783 F.2d 1031 (1986); *Oak Laminates d/o Oak Materials Group* v. *United States,* 8 CIT 300, 302, 601 F. Supp. 1031, 1033 (1984), *aff'd,* 4

[1] 11 CIT at ——, 666 F. Supp. at 1572. The evidence in the case showed that a QAW is never wound and that its battery life expectancy is one year or more.

[2] *See, e.g.,* Defendant's Memorandum in Support of its Motion to Modify and Amend the Judgment, and for Reconsideration and/or a Rehearing or Retrial, p. 2.

[3] *Id.*

> Fed. Cir. (T) 43, 783 F.2d 195 (1986); *V.G. Nahrgang Co.* v. *United States,* 6 CIT 210, 211 (1983). In ruling on a petition for rehearing, a court's previous decision will not be disturbed unless it is "manifestly erroneous." *United States,* v. *Gold Mountain Coffee, Ltd.,* 9 CIT 77, 78 (1985); *United States* v. *Gold Mountain Coffee, Ltd.,* 8 CIT 336, 336–37, 601 F. Supp. 212, 214 (1984)

RSI (India) Pvt., Ltd. v. *United States,* 12 CIT ——, Slip Op. 88-83, at 2-3 (June 30, 1988).

Even if this were not the well-settled law governing a motion for rehearing, and even if the court were convinced of the merit of defendant's present motion,[4] the court is not persuaded that it has jurisdiction.

Defendant's motion states that it is predicated upon CIT Rule 59 and 28 U.S.C. §§ 2645 and 2646. Subparagraph (b) of the rule requires that a motion for rehearing be served and filed not later than 30 days after entry of a judgment.[5]

The motion herein was filed with the Clerk of the Court on the 31st day after entry of the judgment,[6] bearing a certificate of counsel to the effect that service had been effectuated by hand delivery upon plaintiff's attorney. The defendant has since interposed a motion for leave to file a corrected certificate of service on the grounds that "plaintiff's attorney was actually served * * * by sending the motion papers by ordinary mail addressed to his office" and that the "incorrect certificate was attached to the motion papers by a clerical error."

This related motion to set the record straight on the method of service is hereby granted, but the clarification of the matter also clarifies the response of the plaintiff[7] that the motion for rehearing

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[4]The defendant claims that cases like *United States* v. *European Watch & Clock Co.,* 13 Cust. Ct.App. 522, T.D. 41393 (1926), and *United States* v. *Bartiromo,* 9 Cust. Ct.App. 183, T.D. 38003 (1919), support its position that the fact that the QAWs are not susceptible to winding or rewinding does not prevent their classification under the contested items. However, there is no indication that the tariff classifications at issue in those earlier cases had provisions for other than negative limitations. For example, in *European Watch,* the provision only covered "[s]nap fasteners * * * not plated with gold, silver, or platinum, and were mounted on tape". The fact that the fasteners under review were incapable of being mounted did not make them any less "not mounted" under the provision.

By comparison, TSUS Schedule 7 includes provisions containing the negative limitation as well as language to the contrary, namely, "not designed or constructed to operate in excess of 47 hours without rewinding" and "designed or constructed to operate in excess of 47 hours without rewinding". The focus of both provisions is "rewinding"—the watches must be rewound either within or beyond 47 hours—and the necessary implication is thus that Schedule 7 applies to watches with movements that are susceptible to winding. This implication is reinforced by the plain meaning of the prefix "re", and the instructive legislative history brought now to the court's attention by the defendant does not undermine the conclusion that items 716.27 and 716.29 do not cover the QAW.

[5]Subparagraph (e) of the rule also has a 30-day deadline for the making of a motion to amend a judgment, as does subsection (b) of 28 U.S.C. § 2645, and section 2646 of the statute prescribes the same amount of time for a motion for retrial or rehearing.

[6]The 30th day after entry was a Sunday, thereby calling into account CIT Rule 6(a), which provides for the computation of time, in pertinent part, as follows:

> In computing any period of time prescribed or allowed by these rules, * * * or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, * * * in which event the period runs until the end of the next day which is not one of the aforementioned days.

[7]That response *sub nom.* Plaintiff's Answer to Defendant's Motion to Modify and Amend the Judgment, and for Reconsideration and/or a Rehearing or Retrial and Plaintiff's Memorandum sur Question of Jurisdiction and in Opposition to Defendant's Motion was served according to its certificate of service by certified mail, with proper postage affixed and return receipt requested, on the 32nd day after receipt of defendant's papers, in part in conformity with the provision of CIT Rule 6(a), *supra* note 6.

The defendant has interposed a motion for leave to reply to the response wherein it correctly points out that, under CIT Rule 7(d), leave is not required to file a reply in support of a dispositive motion. On the other hand, the

Continued

was received three days after it had been mailed[8]—or too late under the rules for the court to exercise jurisdiction thereon.

One of the rules, number 5(g), provides that service of such a motion

> by delivery or by mailing is completed when received, except that a * * * paper mailed by registered or certified mail properly addressed to the party to be served * * *, with the proper postage affixed and return receipt requested, shall be deemed served * * * as of the date of mailing.

As already indicated, the papers now before the court show that the defendant effectuated service by regular, as opposed to registered or certified, mail. Such an approach is, of course, permissible—under Rule 5(b). In fact, defendant's experienced counsel has filed an affidavit to the effect that service by ordinary mail on or about the date of filing, with *ex post facto* receipt by the opposing side, is a common practice among the bar.[9]

While this practice may be common (and may be a violation of both the letter and the spirit of the traditional requirement(s) of service first and then filing), the real issue posited by the plaintiff is the effect of that practice here. Unlike Federal Rule of Civil Procedure ("FRCivP") 5(b), which states that "[s]ervice by mail is complete upon mailing", the operative rule in this Court (quoted above) is that service by mailing is completed when received, except when registered or certified mail is used. Thus, service was not completed in this case until after the deadline had passed to invoke the court's jurisdiction.

The defendant argues in its reply papers that neither the statute nor the rules relied on in making its motion for rehearing required that the plaintiff have received the papers before filing or that service have been completed by then. In other words, since the filing was timely, the motion was "made" within the meaning of the 28 U.S.C. §§ 2645(b) and 2646.[10] The defendant refers to *Minkap of California, Inc.* v. *United States,* 55 CCPA 1, C.A.D. 926 (1967), wherein the court of appeals relied on the Customs Court Rule 6(a), providing for rehearing motions, in interpreting the controlling statutory

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defendant takes the position that its motion for rehearing is not a dispositive one and that the plaintiff was therefore untimely since Rule 7(d) prescribes only ten days for response to nondispositive motions.

Defendant's dilemma is apparently based on CIT Rule 7(g), which defines dispositive motions to include:

> motions for judgment on the pleadings; motions for summary judgment; motions for judgment upon an agency record; motions to dismiss an action; and any other motion for a final determination of an action.

In this court's view, a motion for rehearing pursuant to CIT Rule 59, depending on its content, can be either dispositive within the foregoing definition or not. *Compare, e.g., Navajo Tribe of Indians* v. *United States,* 597 F.2d 1362, 1366 (Ct.Cl. 1979) (*en banc*) ("[t]here may be motions that do not fit explicitly within any of [the Court of Claims Rule 52(a) categories of dispositive motions] but which nevertheless must be viewed as dispositive because of the effect the ruling on them will have upon the case") *with* USCIT Procedural Handbook, § 30, p. 40 (Jan. 1, 1986 ed.) ("a motion for rehearing is non-dispositive").

In essence, the defendant prays for a final, albeit different, determination herein, hence plaintiff's response was timely and defendant's motion for leave to reply is unnecessary under the Rules of this Court of International Trade.

[8] *Compare, e.g.,* Affidavit of Steven R. Sosnov appended to Plaintiff's Answer to Defendant's Motion to Modify and Amend the Judgment, and for Reconsideration and/or a Rehearing or Retrial *with* Defendant's Motion for Leave to File a Corrected Certificate of Service for its Motion for Reconsideration or Rehearing.

[9] *See generally* Affidavit of Joseph I. Liebman appended to Defendant's Contingent Motion for Extension of Time to File Notice of Appeal.

[10] CIT Rule 5(b) also uses the word "made" viz. "[s]ervice upon the attorney or upon the party shall be made by delivering a copy to him or by mailing it to him * * *" etc.

provision, 28 U.S.C. § 2640 (1966), which also required that such motions be made within 30 days of the contested decision. That is, the rule required "filing" within that period, and the court of appeals thus concluded that mailing by the end of that time, with later filing, did not constitute making within the meaning of the statute.

Were this still the rule today, defendant's position in this case would be well-taken, but the Customs Court rule only referred to filing, while CIT Rule 59(b) explicitly requires service and then filing, each not later than 30 days after the entry of judgment.

The defendant is correct in arguing that court rules cannot enlarge or restrict jurisdiction beyond that which is provided by statute. *Cf.* CIT Rule 1; FRCivP 82. However, rather than going beyond a requirement Congress has imposed, the rules under consideration here set forth procedures which complement the underlying purpose of the statute's strict time limit, to wit, the promotion of finality of judgments. *See* 11 Wright & Miller, Federal Practice and Procedure § 2812 at 87. Moreover, court rules may prescribe practice in the absence of a statutory provision. *See, e.g., Browder* v. *Director, Dep't of Corrections of Illinois,* 434 U.S. 257, 267–72 (1978). Indeed, 28 U.S.C. § 2633 provides, in part, as follows:

> (b) The Court of International Trade shall prescribe rules governing the summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters.
>
> (c) All summons, pleadings, and other papers filed in the Court of International Trade shall be served on all parties in accordance with rules prescribed by the court * * *.

A provision in the predecessor statute, the Customs Courts Act of 1970, Pub.L. No. 91–271, § 113, 84 Stat. 274, 279 (1970), authorized the Customs Court to "provide by rule for pleadings and other papers, for their amendment, service, and filing * * *." At issue in *United States* v. *Fairfield Gloves,* 558 F.2d 1023 (CCPA 1977), was such a rule adopted by the court, namely, Rule 3.2(b) deeming a summons sent by registered or certified mail filed as of the date of the postmark "[f]or purposes of commencement of an action". *Cf.* 28 U.S.C. § 2632 (1980); CIT Rules, Title II. The court of appeals rejected a government contention that the rule, permitting an action to be commenced through the mailing of a summons, rather than receipt by the court, within the statutory period, impermissibly attempted to expand the court's jurisdiction. The opinion noted that "[c]ivil actions may be 'commenced' in courts by means other than 'filing' or filing with the court." 558 F.2d at 1026, n. 4.

In a similar vein, the requirement that a motion be "made" pursuant to 28 U.S.C. § 2645(b) or § 2646 means more than just filing. Under analogous FRCivP 59, service is "critical" in determining the timeliness of motions made pursuant thereto. *E.g., Peake* v. *First National Bank & Trust Co. of Marquette,* 717 F.2d 1016, 1019 n. 5

(6th Cir. 1986). And it is appropriate for this court to consider judicial construction of that analogous rule in construing its rule. *See, e.g.,* CIT Rule 1; *Sumitomo Metal Industries, Ltd.* v. *Babcock & Wilcox Co.,* 669 F.2d 703, 705 n. 3 (CCPA 1982). For example, in *Kruse* v. *Zenith Radio Corporation,* 82 F.R.D. 66, 69 (W.D.Pa. 1979), the court concluded that it was "without any power" to address a motion for retrial due to lack of service within the required period of time, notwithstanding the fact that the motion had been timely filed:

> * * * Service beyond the prescribed * * * period divests the Court of the power to entertain any such delinquent new trial motion. 82 F.R.D. at 68.

In *Kincak* v. *Heckler,* 596 F. Supp. 1162 (W.D.Pa. 1984), the court denied a government motion to alter the judgment on the ground that it had been served three days beyond the mandatory time limit of FRCivP 59(e).

Quite properly, the defendant itself has often successfully opposed requested relief or obtained dismissal of actions where adversaries have failed to meet time requirements. *E.g., United States* v. *Torch Manufacturing Co.,* 509 F.2d 1187 (CCPA 1975); *Former Employees of ITT* v. *Secretary of Labor,* 12 CIT ——, Slip Op. 88–121 (Sept. 12, 1988); *Rhone Poulenc, Inc.* v. *United States,* 12 CIT ——, Slip Op. 88–106 (Aug. 15, 1988); *Nature's Farm Products, Inc.* v. *United States,* 10 CIT ——, 648 F. Supp 6 (1986), *aff'd,* 819 F.2d 1127 (Fed. Cir. 1987). In *Georgetown Steel Corporation* v. *United States,* 801 F.2d 1308 (Fed. Cir. 1986), the plaintiff had sent a complaint to the Clerk of this Court by certified mail within 30 days of the filing of the summons, but the Postal Service returned it for insufficient postage. Upon return, the plaintiff remailed the complaint accompanied by a motion for leave to file it out of time, which was opposed by the government. On appeal, the court held that the plaintiff had not met the "plain and unambiguous" requirements for commencing an action, that is, it had " 'failed to fulfill an explicit condition under Rule 5(g) for date of mailing filing.' " 801 F.2d at 1311, quoting from *NEC Corp.* v. *United States,* 9 CIT 557, 622 F. Supp. 1086 (1985), *reh'q denied,* 10 CIT ——, 628 F. Supp 976 (1986).

> * * * [T]he terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade * * * must be strictly observed and are not subject to implied exceptions. *Lehman* v. *Nakshian,* 453 U.S. 156, 161 (1981). If a litigant fails to comply with the terms upon which the United States has consented to be sued, the court has no "jurisdiction to entertain the suit.[11]

There being no jurisdiction here, the court has no alternative but to dismiss defendant's motion for rehearing.

[11] 801 F.2d at 1312, quoting *United States* v. *Mitchell,* 445 U.S. 535, 538 (1980) (quoting from *United States* v. *Sherwood,* 312 U.S. 584, 586 (1941)).

II

In addition to seeking rehearing on the merits as discussed above, defendant's motion also suggests that the court's encaptioning of slip op. 87–90 and the resultant judgment as a "consolidated" case was erroneous and requests that the reference be stricken from the opinion and judgment.

Upon reflection, the court is persuaded that the defendant has correctly focused on a clerical mistake within the meaning of CIT Rule 60(a).[12] There are innumerable pending actions which raise the substantive issues posed herein, a few of which were consolidated for purposes of pretrial preparations. Of that group, the above-entitled action was designated a test case within the meaning of CIT Rule 84(b) and subsequently tried. Trial did not encompass, however, any of the other actions consolidated. Hence, slip op. 87–90 is hereby deemed corrected to reflect this fact, and the word "consolidated" in the judgment will be deleted.

* * * * * * *

The defendant had 60 days from the date of entry of the judgment in which to file a notice of appeal per 28 U.S.C. § 2107 and § 2645(c). The latter subsection states:

> A decision of the Court of International Trade is final and conclusive, unless a retrial or rehearing is granted pursuant to section 2646 of this title or an appeal is taken to the Court of Appeals for the Federal Circuit by filing a notice of appeal with the clerk of the Court of International Trade within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.

Independent of any effect on time of its motion for rehearing, defendant's statutory period in which to appeal has expired, and it has interposed a Contingent Motion for Extension of Time to File Notice of Appeal pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, which provides, in part:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the [60 days] prescribed by this Rule 4(a) * * *. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Defendant's motion has been made within 30 days after expiration of its 60-day period in which to appeal. Counsel express uncertainty therein as to the tolling of the time in view of plaintiff's position on the motion for rehearing. Indeed, it is even more doubtful that excision of the clerical mistake from the judgment, with the re-

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[12] This rule states that such a mistake "may be corrected by the court at any time on its own initiative".

sultant filing of an amended one, will start the running of a new period to appeal. *See, e.g., Archer* v. *Lynaugh,* 821 F.2d 1094, 1096–97 (5th Cir. 1987); *International Controls Corp.* v. *Vesco,* 556 F.2d 665, 670 (2d Cir. 1977), *cert. denied,* 434 U.S. 1014 (1978). In any event, the court concludes that, although plaintiff's position prevails on the issues of jurisdiction for rehearing, defendant's opposing viewpoint is of sufficient moment to constitute good cause within the meaning of Rule 4(a)(5), *supra,* for not having filed an appeal. That is, since this opinion appears to be one of first impression on Point I, grant of an extension of time is appropriate. *Cf. Washington International Insurance Co.* v. *United States,* 12 CIT ——, 681 F. Supp. 883 (1988).

An amended judgment will be filed. Defendant's motion for extension of time to file a notice of appeal is granted in accordance with Federal Rule of Appellate Procedure 4(a)(5), and defendant's other, related motions, including the one for rehearing, are disposed of in accordance with the foregoing opinion.

So Ordered.

(Slip Op. 88–135)

Chas. Kurz & Co., Inc., plaintiff *v.* United States, defendant

Court No. 86–04–00428

Before Re, *Chief Judge.*

Memorandum Opinion and Order

Pursuant to 19 U.S.C. § 1466(a), the Customs Service imposed a 50 percent *ad valorem* duty on the foreign repairs for the S.S. *Spirit of Liberty.* The plaintiff protests the payment of duties, claiming that a 1984 amendment to 19 U.S.C. § 1466(e), entitles it to a remission of the duties paid. Plaintiff moves for summary judgment. The defendant opposes the motion and cross-moves for summary judgment.

Held: The court holds that there are material issues of fact in dispute. Since the Customs Service properly concluded that Kurz did not file an effective request for application of the 1984 amendment to section 1466(e) during the statutory period, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment granted.]

(Dated October 13, 1988)

Kirkland & Ellis (*David G. Norrell,* at oral argument and on the brief, *Glen Summers, Katherine C. Zeitlin, Robert C. Sexton,* on the briefs), for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, (*James A. Curley* at oral argument and on the brief), for defendant.

Re, *Chief Judge:* Plaintiff, Chas. Kurz & Co., Inc. (Kurz), seeks to recover duties paid to the United States pursuant to 19 U.S.C. § 1466(a) (1982) for ship repairs performed in a foreign country on the S.S. *Spirit of Liberty,* a United States flag vessel.

Kurz contends that Section 214(c)(3)(B) of the Trade and Tariff of 1984, which amended 19 U.S.C. § 1466(e) (1984 Amendment), entitles it to remission of the duties that it paid for the ship repairs. The amendment provides for the retroactive remission of duties "[u]pon request therefore * * *" filed within 90 days of the amendment's enactment. According to Kurz, since it had a petition for review pending during the 90–day statutory period, that petition constituted a legally sufficient "request" for retroactive application of the statute. Kurz also offers several contemporaneous decisions by the Customs Service in support of its claim for remission of the duties paid.

Customs contends that a "request," to be effective, must specifically seek relief under either the superseded "special purpose" exemption, or the 1984 Amendment. According to Customs, Kurz relied on neither ground, and, therefore, cannot claim that it stands on equal footing with other petitioners who sought remission based on the old "special purpose" provision in 19 U.S.C. § 1466(e).

It is clear that the conclusion by Customs that the petition was legally insufficient to invoke the retroactivity provision of the 1984 Amendment does not dispute, either directly or inferentially, Kurz' main factual contentions that (1) it petitioned the Carrier Rulings Branch for remission of duties based on its belief that the Military Sealift Command (MSC) should be billed for the duties; (2) that it did not cite section 1466(d) in its petition, and that it did not limit its petition for relief under that subsection; or (3) that the Carrier Rulings Branch did not characterize Kurz' petition as arising under section 1466(e), and, therefore, did not apply the 1984 Amendment to its petition. The question presented on these cross-motions for summary judgment, therefore, is whether plaintiff made an effective "request" entitling it to the benefit of the 1984 Amendment.

It is the holding of the court that there are no genuine issues of material fact, and that, as a matter of law, Kurz did not file an effective "request" during the 90–day statutory period. Furthermore, since the cases cited by Kurz are distinguishable, Customs did not act in a discriminatory manner in denying it the benefit of the 1984 Amendment. Consequently, plaintiff's motion for summary judgment is denied, and defendant's cross-motion is granted.

In this case, duties were assessed under 19 U.S.C. § 1466(a) which imposes a 50 percent *ad valorem* duty on all foreign repairs performed on United States vessels. *See Suwanee Steamship Co.* v. *United States,* 79 Cust. Ct. 19, 21, C.D. 4708, 435 F. Supp. 389, 390 (1977). At the time that Customs assessed the duties, section 1466(e) exempted from the foreign ship repair duty designated "special purpose vessels" not primarily engaged in the transport of either pas-

sengers or property. The 1984 Amendment to section 1466(e), which became effective on November 14, 1984, abolished the 50 percent foreign repair duty on any vessel "that arrives in a port of the United States two years or more after its last departure from a port in the United States * * *" 19 U.S.C. § 1466(e) (Supp. IV 1986).

Section 214(c)(3)(B) if the Trade and Tariff Act of 1984, which amended section 1466(e), made the exemption from foreign repair duties retroactive in certain instances. This section, in pertinent part, provides as follows:

> (B) Upon request therefor filed with the customs officer concerned on or before the 90th day after the date of the enactment of this Act [Oct. 30, 1984], any entry in connection with the arrival of a vessel used primarily for transporting passengers or property—
>
> > (i) made before the 15th day [i.e., the 15th day after the date of the enactment of this act—November 14, 1984] but not liquidated as of January 1, 1983 * * *
> >
> > shall, notwithstanding the provisions of section 514 of the Tariff Act of 1930 (19 U.S.C. § 1514) or any other provision of law, be liquidated or reliquidated as though such entry had been made on the 15th day [i.e., November 14, 1984].

Trade & Tariff Act of 1984, Pub. L. No. 98–573, § 214, 98 Stat. 2948, 2988–89, *reprinted in a footnote to* 19 U.S.C. § 1304 (Supp. IV 1986).

The S.S. *Spirit of Liberty* sailed from the United States in April 1981, under charter to the MSC of the United States Navy. The vessel was operated by Keystone Shipping Company (Keystone), a wholly owned subsidiary of Kurz. In April and May 1982, the *Spirit of Liberty* underwent a biennial overhaul in Singapore costing $841,952. MSC had requested that the overhaul be performed in Singapore.

In August 1983, the *Spirit of Liberty* returned to the United States, arriving at Norfolk, Virginia where Keystone filed a vessel repair entry report. Pursuant to 19 U.S.C. § 1466(a), the Customs Unit imposed a 50 percent *ad valorem* duty on the foreign repairs.

Keystone filed an application for remission of the duty, stating that, as it understood Customs policy, foreign repair duties to MSC-chartered vessels were to be billed directly to the MSC. Keystone also objected that some of the repair work was non-dutiable. The Customs Unit denied the application as to the most of the expenses, but acknowledged that some specific charges were non-dutiable. The present action seeks to recover duties paid on charges that have not been remitted.

In July 1984, Keystone petitioned the Customs Unit for review of the decision which denied remission of the duty. Again, Keystone's only argument was that MSC should be billed for the foreign repair

duty. On October 16, 1984, the Customs Unit requested that the Carrier Rulings Branch rule definitively on this issue.

While Keystone's petition for review was pending, Congress enacted the 1984 Amendment to section 1466(e). Under the terms of this amendment, subject to conditions not at issue here, all ships which entered the United States more than two years after its last departure and arrived on or after November 14, 1984, are exempt from foreign repair duty. The 1984 Amendment also provides for retroactive remission of duties for ships which entered the United States before November 14, 1984, and remained unliquidated as of January 1, 1983.

The *Spirit of Liberty* arrived in the United States more than two years after its last departure, and the repair entry for the ship was filed on August 19, 1983, thus, before November 14, 1984, and the entry had not been liquidated until May 17, 1985, i.e., after January 1, 1983. Hence, the ship qualified for the remission of foreign repair duties under the retroactivity provision of the 1984 Amendment. The legal issue presented is whether the ship's owners made a valid and timely "request" for the application of the retroactive remission of the duties paid.

Stating that "the fact that a vessel is time chartered to MSC does not constitute a basis for remitting the duty on foreign repairs," in April 1985, the Carrier Rulings Branch denied Keystone's petition for relief. *See* Priv. Ltr. Rul 107102 (Apr. 8, 1985). The Customs Unit forwarded that decision to Keystone and, soon thereafter, liquidated Keystone's entry.

Keystone filed a timely protest maintaining that it was entitled to a remission under the liberalized exemption of the 1984 Amendment because its petition for relief had been pending during the entire 90-day retroactive request period. In September 1985, the Carrier Rulings Branch denied the protest for the following reasons:

> Since the subject vessel was used primarily for transporting passengers or property, it was incumbent upon the protestant to request retroactive application within 90 days of October 30, 1984. The fact that a petition was pending before Customs during the 90 day period did not preclude the protestant from requesting retroactive application of section 208 of the Act to the subject entry. Since a request for retroactive application was not made within the time period allowed by the statute, the protest should be denied.

Priv. Ltr. Rul.107868 (Sept. 12, 1985). Kurz paid the liquidated duty of $441,745.71, plus interest of $40,395.64, which is the amount that Kurz is now seeking to recover.

Contending that there are no material issues of fact in dispute, both parties move for summary judgment pursuant to Rule 56(d) of the Rules of the United States Court of International Trade.

"In ruling on cross-motions for summary judgment, the court must determine if there exist any genuine issues of material fact

and, if there are none, decide whether either party has demonstrated its entitlement to judgment as a matter of law." *American Motorists Ins. Co.* v. *United States,* 5 CIT 33, 36 (1983). It is axiomatic that a motion for summary judgment must be denied if there is a genuine dispute about a material fact. *See Anderson* v. *Liberty Lobby Inc.,* 477 U.S. 242 (1986).

All relevant facts surrounding Kurz' petition are undisputed. Hence, the sole question presented is whether a petition which does not specifically seek relief under either the superseded" special purpose vessel" exemption, or the 1984 Amendment, satisfies the requirements of a "request" for purposes of retroactive application of the 1984 Amendment. Clearly, therefore, the question presented, whether the Kurz' petition satisfied the "request" requirement, is not a question of fact, but a question of law.

Kurz contends that when an application had already been filed, and entry was open and under active consideration by Customs, no additional request was necessary. Consequently, Kurz asserts that its pending application for remission of duties was a sufficient request to meet the "upon request therefor" requirement of the statute. Furthermore, Kurz maintains that, independent of the type of notice generally required, Customs and its personnel had the information necessary to apply the 1984 Amendment.

Customs agrees that no additional request is required as long as the vessel owner's original request was sufficient. However, it contends that the 1984 Amendment's "[u]pon request therefor" language requires a vessel owner either to have petitioned for a "special purpose vessel" exemption, or expressly to request the application of the 1984 Amendment. Therefore, since Kurz' only basis for seeking remission, within the 90-day period that the retroactivity provision was in effect, was that it believed that MSC would or should pay the duty, Customs contends that Kurz' request cannot serve as notice that the vessel should be exempted from duty.

A vessel owner has 60 days after the vessel's arrival in a United States port to file an application for remission of customs duties. 19 C.F.R. § 4.14(d) (ii) (1988). The regulation for remission provides that "[t]he application for relief need not be in any particular form." *Id.* § 4.14(d)(1). A vessel owner dissatisfied with the initial decision on its application may file a petition for review of that decision. *Id.* § 4.14(d)(2). Petitioner, however, is required to "identify the decision on the application for relief and must detail the exceptions taken to that decision." *Id.*

On July 2, 1984, Kurz, in its petition for review, objected to the original determination based upon its understanding of Customs' policy that foreign repair duties were to be billed to MSC. This was the same objection Kurz raised in its original application for remission of duties in September 1983. Thus, nowhere in these requests for remission did Kurz claim that section 1466(e) was applicable.

The first time that Kurz stated or claimed that the vessel was exempt by virtue of the 1984 Amendment to section 1466(e) was in June 1985, long after the 90 day period established by Congress for the filing of requests for the retroactive application of the amendment.

The court does not agree with the contention that the mere pendency of a petition, regardless of its content, determines the applicability of the 1984 Amendment. The amendment's application is determined by the specific reference in the petition for remission or relief under section 1466(e). As the Customs Rulings Branch stated in denying Kurz' petition for remission, "the fact that a petition was pending * * * during the 90 day period did not preclude protestant from requesting retroactive application * * * of the Act to the subject entry." Hence, although an additional request was not necessary in all cases, a request was necessary in those cases in which the petitioner, as here, had not advised Customs that 19 U.S.C. § 1466(e) was the basis upon which it was seeking a remission of duties. Had Kurz, pending petition indicated that 1466(e) was the basis for the request, there would have been no need for an additional request.

It is true that Kurz' petition never cited 19 U.S.C. § 1466(d), and that Customs interpreted Kurz' petition as seeking relief under this section *sua sponte.* Nevertheless, it was clear that Kurz' pending petition relied solely on its belief that foreign repair duties were to be billed directly to the MSC for MSC-chartered vessels. Kurz did not cite any specific statutory subsection, and, therefore, Customs states that it had to "guess." Although Kurz may now say that Customs was mistaken in applying section 1466(d) it was entirely reasonable for Customs, from the contents of the petition, to assume that section 1466(d) was the basis for Kurz' contention that the duties were to have been billed directly to MSC. Hence, Kurz is not excused from its failure to give Customs timely notice of "any exceptions" to the duty to be paid. As stated in *PPG Industries* v. *United States,* 4 CIT 143 (1983) "[c]learly, the Congress did not intend to impose upon Customs * * * an obligation to ferret out information" from a petitioner seeking remission of duties. *See id.* at 148.

Although not specifically applicable and, therefore, only persuasive, decisions involving protests of Customs classifications are illustrative of the information Customs should receive. The Supreme Court has set forth the requirements of a protest in the following language:

> [t]echnical precision is not required [of a protest]; *but the objections must be so distinct and specific,* as, when fairly construed, to show that the objection * * * was at the time in the mind of the importer, and that it was sufficient *to notify the collector* of its true nature and character, to the end *that he might ascertain the precise facts, and have an opportunity to correct the mistake* and cure the defect* * *

Davies v. *Arthur,* 96 U.S. 148, 151 (1878) (emphasis added); *see also Po-Chien, Inc.* v. *United States,* 3 CIT 17, 18–19 (1982) (quoting *The George C. Whitney Co.* v. *United States,* 16 Ct. Cust. Appls. 301, 303, T.D. 42874 (1928) ("[s]trict rules of construction are not applicable to protests and it is sufficient if the importer indicates distinctly and definitely the sources of his complaint *and his desire to make it a foundation of a claim against the government.*") (emphasis added)). Kurz' pending petition, however liberally construed, does not advise Customs of its intent to assert section 1466(e) as a basis for the remission of the duties that had been imposed.

Kurz also contends that there was no need to refer to section 1466(e) or, in an additional request, to the 1984 Amendment because the record demonstrates that Customs had actual notice of Kurz' entitlement to remission of duties under the 1984 Amendment.

It is not denied that, in some circumstances, formal notice is not required if there is actual notice. *See Heraeus-Amersil, Inc.* v. *United States,* 795 F.2d 1575, 1583 (Fed. Cir. 1986), *cert. denied,* —— U.S. ——, 107 S. Ct. 949 (1987). The question, of course, is to determine whether, in the particular case, there as been "actual notice." The Customs Bulletin states that "[a] person can be said to have actual notice when the information is communicated to that person in a way that the person's mind can and does take cognizance of that information." 18 Cust. Bull. 887, 890, C.S.D. 84–28 (1984).

Here, however, Kurz' original application for remission and its petition did not apprise Customs officers that relief was sought under either the "special purpose vessel" exemption or the 1984 Amendment. Kurz' petition clearly and simply objected to the fact that MSC was not billed directly for the duty. If Kurz' petition had been grounded on a claim of "special purpose vessel" status, Kurz would not, in all likelihood, have sought to have MSC billed for the duty. Rather, Kurz would have contested the payment of any foreign repair duty at all. Although the petition referred to the MSC-charter, and might have contained sufficient facts for a Customs officer possibly to have concluded that the *Spirit of Liberty* was a "special purpose vessel," it did not expressly seek an exemption on that ground. Furthermore, since the petition was filed almost four months before Congress enacted the 1984 Amendment, it could not possibly have apprised a Customs officer of Kurz' intent to seek relief under the 1984 Amendment.

Kurz contends that the Government's view or interpretation of the "upon request therefor" language in the statute is too restrictive. Kurz submits that the language of the statue was intended to be liberally interpreted. According to Kurz, the legislative history of the 1984 Amendment indicates that it was designed to lower operating costs and enhance the competitiveness of United States flag vessels. It adds that, since the *Spirit of Liberty's* operating costs would

be lowered by the remission of the duties, Congress did not intend the request requirement to be an "artificial barrier."

Pursuant to all authority, in this particular area this court has stated that it "must interpret a statute in a manner that will carry out or effectuate the congressional intent". *Elizabeth River Terminals, Inc.* v. *United States,* 1 CIT 165, 172, 509 F. Supp. 517, 522 (1981). The primary source for the discovery of legislative intent, however, is the statute itself. *Andrus* v. *Allard,* 444 U.S. 51, 56 (1979).

A careful reading of the statute as well as an examination of the legislative history of the 1984 Amendment does not reveal how the Congressional intent or purpose would be thwarted by denying a retroactive exemption to a vessel which failed to file a "request" within the 90–day period. The statute itself indicates that, by limiting the 1984 Amendment's exemption to vessels not liquidated as of January 1, 1983, and by conditioning that exemption on the filing of a "request," Congress intended to temper or qualify the prospective goal of assisting the American maritime industry.

It has been stated, "that where great inconvenience will result from a particular construction, that construction is to be avoided, *unless the meaning of the legislature be plain; in which case it must be obeyed.*" *SCM Corp* v. *United States,* 80 Cust. Ct. 226, 243, C.R.D. 78–2, 450 F. Supp. 1178, 1190 (quoting *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386 (1805) (emphasis added)). The plain language of the 1984 Amendment itself, however, specifically requires a "request" in order to set in motion the retroactive application of the exemption. Moreover, the legislative history of the amendment explicitly states "that proper notifications" are to be made. H.R. Rep. No. 1015, 98th Cong., 2d Sess. 65, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5024. Denial of the retroactive exemption to a vessel which failed to file a request for the benefit conferred would not, therefore, contravene the intent of Congress as reflected in the statute and its legislative history. *See Swan & Finch Co.* v. *United States,* 190 U.S. 143, 146 (1903) ("benefit is to be construed in favor of the government"). In sum, Customs was not required to grant a petition which did not comply with the statute.

In addition, Kurz contends that three contemporaneous decisions by the Customs Service show that the application of the 1984 Amendment does not require an additional, special notice in cases in which a petition is pending. A close examination of the decisions cited, however, reveals that those cases are factually distinguishable. In the three decisions upon which Kurz relies, each petitioner sought exemption from duty as a "special purpose vessel." The language in the decisions makes it clear that no additional request was necessary "*if a request for 'special purpose vessel' classification* of a vessel which arrived in the United States prior to the effective date of the Act *was filed with Customs* and not resolved as of October 30, 1984." Priv. Ltr. Rul. 106890 (Nov. 20, 1984); Priv. Ltr. Rul. 107146

(Nov. 13, 1984) (emphasis added); *see also* Priv. Ltr. Rul. 107138 (Jan. 24, 1985).

In this case, it is not questioned that Kurz, in its petition, referred to the MSC charter, but did not seek "special purpose vessel" classification. Hence, the Kurz petition and circumstances are clearly distinguishable from the cases cited.

Kurz' desire to have MSC billed for the foreign repair duty may have indicated to the reviewing Customs officer that Kurz itself did not believe that it was entitled to "special purpose vessel" classification. Hence, Kurz was not "similarly situated" as the other petitioners, and the requirement for a "request" for the application of the 1984 Amendment was neither arbitrary nor discriminatory. On the facts presented Kurz cannot show that it was treated differently from others similarly situated. *See Caiola* v. *Carroll,* 851 F.2d 395, 399, 400 (D.C. Cir. 1988). Indeed, the same may be said of the temporary duty suspension for tuna purse seine vessels in order to effect the intent of an Act of Congress passed in December, 1980. *See United States* v. *Mills & Gibb,* 8 Ct. Cust. Appls. 422, 426, T.D. 37667 (1918).

Finally, Kurz challenges the administrative action taken by asserting an equitable estoppel based on Customs' delay in rendering a decision on its July 1984 petition for review. A delay, however, in rendering a decision on Kurz' pending petition did not preclude Kurz from filing a "request" for remission of duties under the 1984 Amendment. On this record, Kurz has "failed to provide evidence of affirmative Government misconduct that would support an estoppel." *Hanson* v. *United States,* No. 88–1147, slip op. at 4 (Fed. Cir. Sept. 23, 1988).

At oral argument, in a vigorous and helpful presentation, counsel for Kurz stressed the unfortunate result in this case. Although the result may be harsh and could have been avoided, Kurz cannot be heard to complain that Customs failed to apply the proper statutory provision when Kurz itself did not indicate which provision was applicable. As stated elsewhere, "this is not a case in which a citizen can claim to have been deprived of fundamental decency and good faith in its dealings with the Government." *Hanson,* slip op. at 6.

After a careful consideration of the pleadings and affidavits submitted, the court holds that a petition which does not specifically seek remission of foreign repair duties under either the "special purpose vessel" exemption, or the 1984 Amendment, does not satisfy the requirements of a "request" under the terms of the amended statute. Therefore, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment is granted.

(Slip Op. 88-136)

ZENITH ELECTRONIC CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT, DAEWOO ELECTRONIC CO., LTD., ET AL., DEFENDANT-INTERVENORS

Court No. 88-07-00488

Before WATSON. *Judge.*

[Plaintiff's motion for preliminary injunction granted.]

(Decided: October 13, 1988)

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson* of counsel) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, (*Velta A. Melnbrencis,* Attorney, Commercial Litigation Branch and *Mark J. Sadoff* Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce) for defendant.

Oppenheimer Wolff & Donnelly (*David A. Gantz* and *Timothy A. Harr* of counsel) for defendant-intervenors Daewoo Electronics Co., Ltd., et al.

MEMORANDUM OPINION AND ORDER

WATSON, *Judge:* In this opinion the Court explains its decision that, when final administrative determinations are the subject of actions for judicial review, the Commerce Department must obtain the approval of the Court in order to make amendments to the final results. Under the authority of the All Writs Act, (28 U.S.C. § 1651) and to preserve all aspects of its jurisdiction over the pending actions, the Court issues a preliminary injunction to bar Commerce from publishing amended results to the third administrative review entitled *Color Television Receivers From Korea; Final Results of Antidumping Duty Administrative Review.*

The final results of the above-mentioned review have been contested in this and four other actions in this Court, namely, *Independent Radionic Workers of America, et al.* v. *United States,* Court No. 88-07-00568; *Daewoo Electronic Co., Ltd., et al.* v. *United States,* Court No. 88-07-00584; *Samsung Electronic Co., Ltd., et al.* v. *United States,* Court No. 88-07-00589; and *Goldstar Co., Ltd., et al.* v. *United States,* Court No. 88-07-00593.

On September 28, 1988, this Court issued a temporary restraining order barring Commerce from "rescinding, revising, or otherwise altering" the final results of the third review or from altering the cash deposit instructions issued by Commerce to the Customs Service following the final results. On September 29, following representations by plaintiff that publication of amended results was imminent, the Court amended the restraining order to bar publication in the Federal Register. The temporary restraining order was extended for an additional ten-day period on October 8, 1988.

On October 11, 1988 the Court heard oral argument on the motion for a preliminary injunction. At that time, the Court granted a motion to intervene by Daewoo Electronics Co., Ltd., Daewoo Electronics Corporation of America, Inc., and Daewoo Corporation

("Daewoo"), the interested parties whose assertions of error following the final determination led Commerce to conclude that three ministerial errors had been made, that certain dumping margins were actually lower than had been determined, and that related cash deposit rates should be lowered from 23.30% to 15.23%.

The basic issue in this motion for a preliminary injunction is whether the Commerce Department can amend the results of a final determination while it is the subject of a court action, without obtaining the approval of the Court. A secondary issue is whether plaintiff was given a fair and reasonable opportunity to present its views regarding the asserted errors. The Court finds that basic considerations of court jurisdiction, judicial authority and judicial economy dictate that alteration of an administrative result while it is under court review cannot be done without the approval of the Court. The Court further finds that plaintiff was not given a fair opportunity to present its view regarding the asserted errors.

The need to obtain the approval of the Court in order to change the administrative result is simply a recognition of the Court's jurisdiction over the action. One of the ways in which jurisdiction is exercised is by the power of the Court over the subject matter of the action. *Cooper* v. *Reynolds*, 10 Wall (77 U.S.) 308, 316 (1870). When a party to a judicial action contemplates doing anything to directly alter the subject matter of the judicial proceeding a proper regard for the authority of the Court requires that the permission of the Court be obtained.

This is a principle which governs the conduct of a Court with respect to its appellate tribunal and it should also govern the conduct of an agency which is subject to a comprehensive system of judicial review. For example, Rule 60(a) of the Federal Rules of Civil Procedure, following the ordinary grant of authority to a district court to correct its clerical errors "at any time" expressly provides that while an appeal is pending such errors may be corrected "with leave of the appellate court." This recognizes the jurisdiction and authority which the appellate tribunal has obtained over the matter.

The Commerce Department defends its intention to amend the results of the determination without the approval of the Court as a matter within its inherent authority and further, as justified by a specific provision for correction of clerical or ministerial error in 19 U.S.C. § 1751(f)[1] But this argument completely ignores the fact that the administrative authority to correct clerical errors is not absolute and does not operate in a vacuum once a judicial review has been commenced. At that point the authority of an administrative

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[1] "(f) Correction of Ministerial Errors, - The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term 'ministerial error' includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial."

agency to correct its clerical errors must be exercised in a way that is consistent with the fundamental obligations which flow from subjection to judicial review.

Of course, the simplest case would be if the correction of clerical errors can be fairly accomplished before the necessity arises to invoke the jurisdiction of the Court. That would be a situation in which only the asserted clerical errors are in contention and correcting them might completely obviate the need for bringing an action in Court. This was the basic reason for the provision in 19 U.S.C. § 1751(f) requiring Commerce to "establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued . . . " *See,* H. Rep. 100–40, Part 1, 100th Cong. 2nd Sess. 144. But even that simple state of affairs must operate under the unavoidable condition that under 19 U.S.C. § 1516a, an interested party has only 30 days within which to bring an action for judicial review of any determination, finding, or conclusion in the final determination. It is likely therefore, that in many cases, even when a party is only seeking correction of alleged ministerial or clerical errors it will have to start an action in court before the 30–day statute of limitation expires so as not to lose the protection of that action against a possible adverse result of the administrative correction process. Still more often, as here, the alleged ministerial errors will be part of a more complex dispute whose central issues cannot be resolved except by judicial decision. Once the final determination becomes the subject of an action in court, one way or another, allowing Commerce to take independent steps to alter the determination is in conflict with the authority of the Court.

This does not mean that Commerce cannot continue the process of identifying ministerial errors while a judicial proceeding is underway. But it does mean, that in order to effectuate corrections in a way that acknowledges the jurisdiction of the Court over the underlying determination and in order to give the Court its proper authority over the question of whether the corrections should be made and, if so, how judicial review should be conducted thereafter, Commerce must apply to the Court for permission to make amendments to the final determinations.

The potential for disruption if this salutary procedure is not followed was demonstrated in *NTN Bearing Corp.* v. *United States,* 684 F. Supp. 1093 (CIT 1988). In that case actions challenging the dumping determination by Commerce and the injury determination by the International Trade Commission were affected when, after the commencement of the actions, Commerce independently amended its final determination and the antidumping duty order to find lower dumping margins. The government took the position, in opposing plaintiff's motion to amend its complaints to meet the substance and effect of the amended result, that plaintiff had to bring an entirely new action. The Court, choosing the lesser of two evils, al-

lowed the amendment of the original complaints but the predicament it faced demonstrated the potential disruptive consequences of agency alterations of matters which are *sub judice*. The events of that case strongly suggest that untoward complications could have been avoided and new developments could have smoothly integrated into the ongoing court action if the agency had submitted the desired amended result to the court for approval before it was published. The existence of a mandatory requirement that it do so was evidently not raised in that case.

As to the question of whether plaintiff had the opportunity to present its views as required by 19 U.S.C. § 1751(f), the affidavit of counsel for plaintiff leads the Court to conclude that it did not. Commerce is evidently in the process of developing procedures to comply with the mandate of § 1751(f) and it does not appear that counsel for plaintiff had sufficient time and access to the relevant material to make a meaningful response.

On the subject of possible administrative procedures in this area, the Court notes once again (so that its decision here is not seen as barring Commerce from identifying necessary corrections or forcing it to act within a highly restrictive period of time), that it is entirely conceivable that the correction procedure can extend into the period of judicial review. In fact, a logical standard for deciding whether the errors found can be corrected in the "reasonable time" set by § 1751(f) would be whether, in a determination which has become subject to judicial review, the application to the Court for permission to make the corrections can be made in time to allow a harmonious incorporation of the corrections into the process of judicial review.

The Court also notes that although the impairment of the Court's jurisdiction, by itself, is sufficient to support the injunctive relief requested there is also an element of irreparable injury to plaintiff in that it has not been given the benefit of adequate procedural safeguards and consequently faces the prospect that the cash deposit rates required of someone who has been found to be dumping and causing injury will be lowered in a manner which is not in accordance with law. It is clear that Congress looked on the requirement of cash deposits as a meaningful part of the reduction of damage to the domestic industry. *See* S. Rep. 96–249, 96th Cong., 1st Sess. 76. Be that as it may, the impairment of the Court's jurisdiction is the primary ground of injunctive relief in this action.

Upon consideration of the motion of plaintiff, Zenith Electronics Corporation, all responses thereto, and all other papers and pleadings had herein, the Court makes the following findings of fact:

(1) that plaintiff commenced this action to secure judicial review of the determination by the United States Department of Commerce ("Commerce") of the final results of Commerce's administrative review of the antidumping duty order on color tel-

evision receivers from Korea ("Final Results") and the requirements based thereon for cash deposit of estimated antidumping duties, which Final Results were published on July 1, 1988 (53 Fed. Reg. 24975);

(2) that said Final Results are the subject matter of this litigation and that the Court's jurisdiction over the Final Results has attached; and

(3) that, unless prevented from so doing, it is apparent that Commerce intends to and will unilaterally alter the Final Results and cash deposit requirements based thereon.

On the basis of the foregoing, the Court reaches the following conclusions of law;

(1) that any unilateral alteration of the Final Results by Commerce would impair this Court's jurisdiction over the Final Results which are subject matter of this litigation;

(2) that any unilateral alteration by Commerce of the Final Results and the cash deposit requirements based thereon would result in immediate and irreparable harm to plaintiff;

(3) that issuance of a preliminary injunction will not harm the defendant; that such temporary hardship as intervenor Daewoo may endure as a result of its issuance is outweighed by the factors of impairment of this Court's jurisdiction and injury to plaintiff; and

(4) that the public interest, which would not be served by any alteration of the Final Results without specific authorization from this Court, will best be promoted by the Court's preservation of the *status quo*.

For the foregoing reasons, the Court concludes that, in order to aid and preserve this Court's jurisdiction, it is necessary and appropriate to prevent any alteration of the Final Results from being undertaken without the authorization and approval of this Court, and it is hereby

ORDERED that plaintiff's motion for a preliminary injunction with regard to the determination contested in this civil action (i.e., "Color Television Receivers From Korea; Final Results of Antidumping Duty Administrative Review," published July 1, 1988, at 53 Fed. Reg. 24975) ("the Final Results") be, and the same hereby is, granted; and it is further hereby

ORDERED that the defendant herein, together with its delegates and all other officers, agents, servants and employees of the United States Department of Commerce, including Commerce officers Jan W. Mares, Assistant Secretary of Commerce for Import Administration, and Joseph A. Spetrini, Deputy Assistant Secretary of Commerce for Compliance, be, and the same hereby are, enjoined from rescinding, revising, or otherwise altering the said Final Results; and it is further hereby

ORDERED that the defendant herein, together with its delegates and all other officers, agents, servants and employees of the United States Department of Commerce, including the aforenamed Commerce officers, be, and the same hereby are, enjoined from rescinding, revising, or otherwise altering the instructions issued by Commerce (under cover of memorandum from Holly A. Kuga, dated July 12, 1988) to the United States Customs Service concerning the cash deposits of estimated antidumping duties, based upon the Final Results, to be required on shipments of Korean color television receivers entered, or withdrawn from warehouse, for consumption on or after July 1, 1988, and prior to publication of the final results of any administrative review of the antidumping duty order subsequently conducted and completed by Commerce; and it is further hereby

ORDERED that this injunction shall remain in effect during the pendency of this litigation or until such earlier time as this Court determines that the defects it has found in the proposed amendment of the Final Results have been remedied, that the amendment of the Final Results is appropriate and the Court specifically authorizes and approves such amendment.

(Slip Op. 88–137)

MONSANTO CO. PLAINTIFF *v.* UNITED STATES, DEFENDANT *v.* NISSAN CHEMICAL INDUSTRIES, LTD., ET AL., INTERVENORS

Court No. 87–01–00001

[Judgment for defendant.]

(Decided October 14, 1988)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, David Scott Nance, and *Lane S. Hurewitz) for the plaintiff.*

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch *(Platte B. Moring, III),* Civil Division, United States Department of Justice, for defendant.

Graham & James (Yasuhiro Hagihara, Lawrence R. Walders and *Denis Oyakawa)* for defendant-intervenor Nissan Chemical Industries, Inc.

Weil, Gotshal & Manges (A. Paul Victor, Charles H. Bayar and *Douglas A. Nave)* for defendant-intervenors Shikoku Chemical Corporation and Mitsubishi Corporation.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiff's motion for judgment upon the administrative record pursuant to Rule 56.1 of the Rules of this Court. In this action, plaintiff challenges the Department of Commerce, International Trade Administration's (ITA) final results in the first administrative review of an-

tidumping duty orders covering certain chemicals imported from Japan. *Cyanuric Acid and its Chlorinated Derivatives from Japan Used in the Swimming Pool Trade,* 51 Fed. Reg. 45,495 (Dec. 19, 1986). The challenged administrative review covers two Japanese manufacturers of cyanuric acid and its chlorinated derivatives (CA & CD) exported to the United States and the period November 18, 1983 through March 31, 1984. ITA found weighted average dumping margins of zero percent for one manufacturer, Nissan Chemical Industries, Inc., on the two subject products it exported to the United States—dichloro isocyanurates and trichloro isocyanuric acid. For the second manufacturer, Shikoku Chemicals Corporation, ITA arrived at margins of 1.74 percent for imports of cyanuric acid, 9.66 percent for dichloro isocyanurates and 0.66 percent for trichloro isocyanuric acid. 51 Fed. Reg. at 45,497.

Arguments

Plaintiff raises five basic issues: (1) it alleges that ITA violated the statute by including in its calculation of foreign market value sales of merchandise which were not within the class or kind of merchandise covered by the investigation;[1] (2) plaintiff asserts a circumstances of sale adjustment should be made to foreign market value because of differences in value between CA & CD sold in the swimming pool trade and that sold in other trades, and that foreign market value should be adjusted to reflect restrictions on the sale of CA & CD in Japan; (3) plaintiff alleges that ITA's investigation to determine whether certain sales were below cost of production was inadequate;[2] (4) plaintiff alleges that it was deprived of its constitutional right to meaningful participation in the administrative review because of ITA's failure to provide it access to certain documents relating to the cost of production investigation; and (5) plaintiff objects to a circumstances of sale adjustment to foreign market value for Shikoku's advertising expenses.

Plaintiff's motion is opposed by defendant and two intervenors. The intervenors are the foreign producers of the relevant chemicals that were the subject of the investigation.

Discussion

I. Sales to be Included in Calculation of Foreign Market Value

The chemicals under investigation are cyanuric acid and its chlorinated derivatives (CA & CD). For purposes of 19 U.S.C. § 1673 (1982), ITA, in its original less than fair value investigation, defined the class or kind of merchandise under investigation as CA & CD for use in the swimming pool trade. 48 Fed. Reg. 52,497 (Nov. 18,

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[1] Plaintiff raises other arguments regarding the sales to be included in calculating foreign market value. It argues that sales of merchandise outside the class were not in the ordinary course of the subject trade and that certain sales were intended to establish a fictitious market.

[2] In a related argument plaintiff argues that ITA conducted its verification based on an inadequate questionnaire response.

1983) (Preliminary Determination). Both respondents in this case sold CA & CD in granular form in the United States.

In order to determine whether goods are being sold in the United States at less than fair value, ITA must compare the foreign market value of the subject merchandise with the price at which such merchandise is sold in the United States. 19 U.S.C. § 1673 (1982). Foreign market value is defined, in relevant part, as the price, at the time of exportation of such merchandise to the United States, at which "such or similar merchandise" is sold in the "ordinary course of trade" in the home market of the country of exportation. 19 U.S.C. § 1677b(a)(1) (1982).

Pursuant to 19 U.S.C. § 1677(16) (1982), there are three categories of such or similar merchandise. The first category is the preferred category and it is to be used if sales of such merchandise exist.[3] It includes merchandise which is the subject of the investigation and *other merchandise which is identical in physical characteristics to the merchandise under investigation.* Sales of CA & CD in granular form were made in Japan. To a large degree, however, they were made outside the swimming pool trade.[4] Plaintiff argues that because CA & CD in granular form for use outside the swimming pool trade do not fall within the scope of the class or kind of merchandise to be subjected to antidumping duties in the United States, ITA erred in its selection of the basis for the determination of foreign market value. ITA argues that it is following the words of the statute exactly as set forth, and that it has no choice under 19 U.S.C. § 1677(16) but to proceed to include in its foreign market value calculations merchandise with identical characteristics as that under investigation.

Plaintiff has presented no credible argument that the literal words of the statute should be read in any other way than that suggested by ITA. The words of the first category of § 1677(16) can only mean that other identical merchandise is to be included even if it is not the merchandise which is in the relevant class. Plaintiff argues that ITA's literal interpretation of the statute may produce absurd results. Plaintiff argues it is simply inconceivable that Congress intended non-subject merchandise to form the basis for establishing foreign market value. Essentially, the argument is that the comparison being made is of apples and oranges. The answer here is that apples are apples no matter who buys them and that a market or use limitation on the subject class, by itself, does not restrict the basis for the fair market calculation if all the merchandise included is physically identical.[5]

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[3] *See Timken Co.* v. *United States,* 10 CIT ——, —— 630 F. Supp. 1327, 1336 (1986).

[4] Apparently, granular CA & CD is not used very often in swimming pools in Japan as there are few private swimming pools in Japan. It is granular sales for swimming pool use in the United States that concern petitioners most.

[5] The market limitation on the subject class can lead to other bases for exclusion from the calculation or to adjustments to sales values. That is not the argument addressed here.

The general rule of law is that a statute must be applied according to its plain language unless absurd results are produced thereby. Plaintiff's speculations about the conduct of the producers here, *see* discussion *infra,* is not a demonstration that the plain language is absurd. The antidumping law does not counteract all conduct of harm to plaintiff. Furthermore, it does not contain every safeguard possible to prevent avoidance of dumping margins by foreign producers in situations where their conduct might seem to plaintiff to warrant duties. The antidumping laws counteract dumping in a very specific way. ITA is not at liberty to alter the scheme.

In a related argument, Monsanto argues that sales not made in the swimming pool trade are outside the ordinary course of trade within the meaning of 19 U.S.C. § 1677b(a)(1)(A) (1982), and may not be included in the fair market value calculation. The term ordinary course of trade, is defined in 19 U.S.C. § 1677(15) (1982) as "the conditions and practices which * * * have been normal in the trade under consideration with respect to merchandise of the same class or kind" as the subject merchandise. According to Monsanto's reading of the statute, if the sales are not sales of the class or kind of merchandise defined by ITA, i.e., those within the swimming pool "trade," they are not sales in the ordinary course of trade and should be excluded from the fair value comparison.

To read the statute in the manner suggested by Monsanto would cause it to conflict with the hierarchies set out in section 1677(16), which indicates that merchandise that is physically identical to that in the subject class should be the basis for foreign market value, if such merchandise is available. The commonly understood purpose of the ordinary course of trade provision is to prevent dumping margins from being based on sales which are not representative, for example, sales of obsolete merchandise. Ordinarily such sales are not appropriate for comparison purposes. A sale destined for a different type of end user is not automatically a sale made under different conditions or pursuant to different practices than sales made to the end user described in the subject class, so as to render the sale outside the ordinary course of trade. Some confusion may have been caused in this case because the scope of the investigation order has been defined as the swimming pool trade. It is difficult to reconcile the use of the word "trade" in the scope determination with the way the word is used in the ordinary course of trade definition. Perhaps if ITA had said the subject of the investigation was CA & CD sold for swimming pool "use" this issue would not have arisen.

The language of section 1677(15) would appear to mean in this circumstance that if the ordinary conditions of trade are different for some of the identical merchandise than they are generally for the merchandise which is in the class or kind as defined by ITA so as to make the sales unsuitable for comparison purposes, then such sales should not be considered as in the ordinary course of trade.

Such a reading does not conflict with section 1677(16). Plaintiff has not demonstrated that any of the sales of granular CA & CD used in computing foreign market value were made under conditions and according to practices which are different from those ordinarily applicable to sales of CA & CD for swimming pool use.

Another argument supporting plaintiff's claim that foreign market value was determined incorrectly is that ITA was obligated to investigate sales of other forms of CA & CD in the home market in order to determine whether a "fictitious market" had been created. According to plaintiff, the cost of producing tablets as opposed to granules is not substantial.[6] Plaintiff asserts that because tablets are not within the subject class, the producers, without penalty, can recoup the losses they might incur by making low priced home market granular sales by charging high prices for tableted CA & CD in Japan.[7]

The statutory provision concerning disregard of fictitious markets in establishing foreign market value is codified at 19 U.S.C. § 1677b(a)(1)(B) (1982).[8] Prior to 1988, at least, it would have been very odd for ITA to disregard a substantial number of sales of identical merchandise to unrelated parties on the basis that such sales were intended to establish a fictitious market.[9] Investigation of non-identical forms of merchandise in such a situation would not seem to be called for by the pre-1988 law. The problem is that a manufacturer may support dumping by a variety of practices. The antidumping law appears not to require ITA to investigate in detail the totality of a manufacturer's operations. That the 1988 law allows ITA to look beyond sales of the subject merchandise does not mean that ITA should have interpreted the pre-1988 law to require it to investigate in the same manner. ITA acted reasonably under the facts of this case and the law as it existed before 1988.[10]

There seems to be agreement that, excluding other factors, there is a significant enough number of granular sales for ITA to have based its determination on actual sales of granular CA & CD in the home market. There is also no challenge made here to the scope of the subject class. Under the circumstances of this case, it appears that ITA has no reason not to follow the plain words of the statute. There is no evidence indicating that ITA should change the data on which it based foreign market value to exclude sales of granular CA

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[6] Apparently a binding agent is added and the chemical is compressed. A small cost difference leading to price differences, however, could cause margins to change from *de minimis* to effective levels.

[7] The record does not reveal a price differential between granular and tableted sales in Japan that is unrelated to the value of the differing physical forms or other acceptable pricing factors, nor does it show that the Japanese producers are pricing their granular sales, including the non-swimming pool granular sales, in some artificial manner because of the presence of tableted sales. Plaintiff requests an investigation to establish these facts.

[8] The statute states that "[i]n the ascertainment of foreign market value * * * no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account."

[9] Section 1319 of the Omnibus Trade and Competitiveness Act of 1988 indicates that ITA *may* consider price movement as to different forms of merchandise after issuance of an antidumping order as evidence of the establishment of a fictitious market, if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise. Pub. L. No. 100–418, 100th Cong., 2d Sess. (1988) (H.R. 4848).

[10] The court makes no determination as to what ITA *may* or *must* do now.

& CD merely because they are not made for swimming pool use or to include non-granular sales in its investigation. As there has been no challenge to ITA's determination that all granular CA & CD are the products which are identical in physical characteristics to the products sold in the United States that are to be the subject of any antidumping duties, ITA has proceeded properly in applying 19 U.S.C. § 1677(16), § 1677(15) and 19 U.S.C. § 1677b(a)(1)(B).

II. Effect on Foreign Market Value Calculation of Differences Between Swimming Pool and Non-Swimming Pool Sales

Monsanto argues that it is entitled to a circumstances of sale adjustment to foreign market value on account of any differences in value or cost between swimming pool and non-swimming pool merchandise. Under the statute, a circumstances of sale adjustment allows the administering authority, ITA, to make "due allowance" for differences in circumstances of sales in the two markets being compared. 19 U.S.C. § 1677b(a)(4)(B) (1982). The adjustment is intended to address and correct situations in which a difference (or lack of difference) between United States price and foreign market value is "wholly or partly due to * * * differences in circumstances of sale." *Id. See* 19 C.F.R. § 353.15 (1987).

Monsanto believes the relevant sales in the U.S. market, being for swimming pool use, are unfairly compared to non-swimming pool foreign market sales which are allegedly priced differently from swimming pool sales.[11] Plaintiff made this argument at the administrative level and even argued that an adjustment because of differences in packaging between swimming pool and non-swimming pool sales was necessary. There is, however, no evidence of record that whatever differences may exist between prices of pool and non-pool merchandise are related to differences in packaging, or of any other differences between foreign and U.S. sales in terms of costs, expenses, or value. *See* 19 C.F.R. § 353.15 (1987).

Monsanto also argues that ITA must adjust foreign market value to reflect certain restrictions on use which apply to CA and CD sold in the swimming pool trade. Specifically, plaintiff asserts that the manner in which CA and CD were packaged for sale in different markets might restrict the ability of the ultimate consumer to use them.[12] Both the statute and ITA regulations provide for an adjustment to home market price when home market sales are restricted in such a manner as to affect the value of the merchandise to the purchaser. 19 U.S.C. § 1677(14) (1982); 19 C.F.R. § 353.3(b) (1987).

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[11] The record reveals evidence of some difference in prices among granular sales for various markets in Japan. Apparently, for some markets, lower cost alternatives are available. The producers do not concede that any significant price differential exists.

[12] Specifically, plaintiff now asserts that the size of the packaging might have an effect upon the ability of a particular consumer to use that package, *i.e.* large quantity users, such as sewage treatment users, would have little use for small packages, and vice-versa for small quantity users such as swimming pool users. Plaintiff also theorizes that "[s]imply by not putting directions on the back of the package destined for the sewage treatment trade, the Japanese producer could ensure that the low priced CA & CD would not be bought by a consumer in the swimming pool trade," who supposedly depend upon the directions on the package to tell them how much product to use. Plaintiff's Brief at 33–34. As a great deal of the material at issue is sold to institutional users it is unlikely that the producers are "restricting" sales in this manner.

Defendant responds that packaging was not the type of restriction contemplated by Congress when it enacted the present wording of this section of the statute.

Plaintiff's argument has little appeal. Both the wording of the statute and its legislative history lead the court to believe that this section of the statute was intended to address restrictions placed by the manufacturer on this disposition of the merchandise by the purchaser which adversely affect the market value of such merchandise, such as restrictions on resale. *See* S. Rep. No. 1619, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3498, 3500–03. Plaintiff has failed to present a convincing argument that Congress intended a broader interpretation of this provision which would include differences in packaging of the type described here.

Moreover, defendant correctly notes that plaintiff did not articulate this argument clearly in the administrative proceeding below. This is the kind of factually based collateral issue that, under the circumstances of the case, the agency cannot be held responsible to examine unless it is spelled out during the administrative proceedings.

III. Adequacy of Cost of Production Investigation

With regard to one producer, plaintiff challenges the adequacy of ITA's investigation to determine whether significant sales were below the cost of production. *See* 19 U.S.C. § 1677b(b) (1982). Under the statute, whenever ITA has reasonable grounds to believe, or suspect, that a foreign producer is selling in its home market at prices below the cost of production, ITA must determine whether that producer is in fact making sales at less than cost. *Id.* In the present case, ITA's investigation proved negative and therefore actual home market prices were utilized.

During the course of the investigation, the concerned producer submitted data in response to ITA's questionnaire which ITA considered to be fully responsive. Accordingly, ITA proceeded to verify the information. Monsanto argues that the response was inadequate because it did not contain specific cost data on input products. Monsanto also alleges that ITA cannot allow such inadequacy to be cured by accepting further information at verification and after verification. Monsanto asserts ITA was not prepared to focus on certain areas of concern, because the relevant information was not present in the questionnaire response prior to verification.

The producer uses a cumulative cost of production accounting method whereby the costs for each stage of production are aggregated and carried forward. In its questionnaire response, the producer provided cumulated cost information. During verification, ITA traced various items back through the production process and found that the information provided in the questionnaire response was accurate. Various costs and expenses for labor, raw materials and energy were checked. Confidential Record Document Number (CR)

19.[13] In general, ITA appears to have conducted an adequate verification although it did not examine in detail every aspect of the cost of production information which concerns Monsanto. Verification is a spot check and is not intended to be an exhaustive examination of the respondent's business. ITA has considerable latitude in picking and choosing which items it will examine in detail. *See Hercules, Inc.* v. *United States,* 11 CIT ——, 673 F. Supp. 454, 469 (1987). Furthermore, ITA may accept, as it did here, post-verification information which indicates that the original questionnaire response was correct or clarifies it.

Monsanto has not argued that ITA's general method of investigation is inadequate, but, rather, that because of an inadequate questionnaire response Monsanto could not raise all issues which it now sees and that ITA has not obtained complete answers to all of these questions. Much of the confidential information, such as the confidential questionnaire responses, were received by Monsanto's counsel during the administrative proceeding, and Monsanto did raise at the administrative level almost all of the issues, including sub-issues, it raises here. A few elaborations of earlier arguments may be based on verification documents obtained subsequently.

Although it finds ITA could proceed as it did, the court will discuss what seems to be some of the more troubling questions raised by Monsanto. First of all, the producer was allowed a credit for a product which is produced during one of the stages of the production of CA & CD. ITA considered this to be a by-product as opposed to an intermediate product or co-product and, accordingly, as is normal under general accounting principles, a credit against cost was given for the value of the recovered by-product. *See* W. Morse & H. Roth, *Cost Accounting* 157 (2d ed. 1986). Monsanto argues that the valuable by-product is not produced until further processing occurs and thus a full credit against cost should not have been allowed. Alternatively, it argues that the product should have been treated as an intermediate product for which no credit against cost is generally allowed. The producer responds that Monsanto has misperceived which product is produced, and that no further processing is required.

The court is aware of no evidence that the valuable by-product was not produced or that additional processing occurred. By contrast, one of the documents produced by the respondent before this issue was raised references the very by-product that respondent claims was actually produced. Nissan Cost of Production Verification Document Number N–CA1 at 176. In addition, the court is aware of nothing in the record which supports plaintiff's assertion that an intermediate product was produced. ITA saw no reason to investigate this matter further during the verification and Mon-

[13] This includes intra-company transfer materials.

santo has presented nothing to indicate that the documents presented by the producer were not truthful on this point.

Monsanto next claims that a large portion of the producers' expenses are attributable to research and development (R & D), and that one of the publications issued by the respondent indicates that a substantial percentage of its expenses are for R & D. Monsanto acknowledges that ITA verified "factory" R & D costs, but it claims that "corporate" R & D costs, R & D costs incurred for general corporate purposes distinct from R & D costs at the factory level, may have been overlooked. The producer claims that corporate R & D is part of general expenses which were properly allocated. There is nothing in the record that indicates that the R & D costs are not fully accounted for either through direct factory costs or through allocation of general expenses.[14]

A final problem, which seems at first glance to present some difficulties, is the question of whether ITA utilized a proper depreciation time period in its cost of production calculations. The controversy centers on equipment for which the producer used, or claims to have used, an eight year depreciation period, in accordance with Japanese tax laws. ITA asserts that it accepts depreciation periods which are in accordance with generally accepted accounting principles, and the depreciation period required by the law of the producer's country would be appropriate.[15] Plaintiff claims that the respondent's data is not consistent with this assertion. Supplemental submissions seem to indicate that the eight year depreciation period was used and that the particular depreciation time period is industry specific so that factors such as the corrosiveness of the product at issue were likely considered.[16] No deficiency in the investigation is revealed as to this point.

Essentially, Monsanto directs the court to several problematic areas which it believes ITA was obligated to investigate further in order to determine whether the respondent provided accurate information. Monsanto claims that it is not at fault for not particularizing its claims during the investigative stage, because it did not have access to a substantial amount of information prior to the verification, particularly in a form which Monsanto's internal experts may use. Monsanto claims that the producer's public response was too summary and that Monsanto, as a member of the public, should have been permitted access to more detailed data so that it could raise appropriate questions and thus assist ITA in performing its verification and analysis of information obtained at verification. Al-

[14] There is nothing to support Monsanto's speculation that more R & D costs should have been allocated directly as opposed to being included in the general expense category.

[15] In *Carbon Steel Products from Brazil*, 49 Fed. Reg. 28,298, 28,302 (Jul. 11, 1984) ITA indicated that, in calculating the cost of production, it would use a firm's expenses as recorded in its financial statements as long as those statements are prepared in accordance with the home country's generally accepted accounting principles and do not significantly distort the firm's financial position or actual costs.

[16] As to some issues, there are no complete explanations in the record. These areas were not of concern to ITA and Monsanto has not demonstrated that they should have been.

ternatively, counsel argues that it should have received access to further data under protective order.

First, plaintiff has not made a case, based on citation to particular meaningful data, demonstrating that the material excised from the public version was by statute or regulation required to be included. *See generally* 19 U.S.C. § 1677f (1982) and 19 C.F.R. § 353.28 (1987). Most of the information sought to be obtained is of a highly confidential nature. Second, Monsanto's counsel did ask for access to confidential data and received some, but not all, such data. Monsanto, however, is entitled under the statute to challenge denial of access for its attorneys to confidential information if it believes it must have that information in order to meaningfully participate. 19 U.S.C. § 1677f(c) (1982). Monsanto brought no such action. It seems that the court should not remand this action to ITA to redo the verification simply because of questions raised now. If plaintiff believed that ITA could conduct a meaningful investigation in this case only with its representatives' input, then it should have sought relief from the court at a time when it would have been more useful. This is the purpose of allowing immediate judicial review of denial of access to confidential information.[17]

If the questions raised by Monsanto here were shown to be substantial, a different result might ensue, but each allegation which superficially seems to have any basis has been appropriately rebutted. Furthermore, plaintiff has made no showing that ITA *should* have investigated anything more. No errors have been found; only areas where ITA might have investigated further. At this point the court will not order ITA to investigate Monsanto's suspicions. ITA was satisfied as to the accuracy of every item it did investigate thoroughly and no substantial errors have been found to date.

IV. Deprivation of Right to Meaningful Participation

Following its claim that ITA's investigation was inadequate, Monsanto raises the argument that it was denied a constitutional right to meaningfully participate in the investigation because it did not have adequate information in advance of verification.

Unfair trade proceedings are sometimes described as investigatory in nature, but the agency actions which are being reviewed might be best described as quasi-adjudicatory, quasi-investigatory. To the extent the proceedings adjudicate rights, due process concepts may be applicable. Indeed, in requiring parties to fully exhaust administrative remedies under some circumstances, the court recognizes that these actions do not involve only investigative duties of the agency. To the extent the agency is acting in an investigatory capacity, however, constitutional due process concepts seem out of place. *See Hannah* v. *Larche*, 363 U.S. 420 (1959). The real question in this case is whether ITA has fulfilled Congressional in-

[17] In house Monsanto personnel would not have been allowed access to confidential data. The balance of interests which encourages participation and turn over of confidential data to ITA does not permit such access.

tent, including providing whatever process the statute defines.[18] Plaintiff here is concerned with the adequacy of the core *investigation. ITA must be allowed to conduct the investigation so as to fully comply with the statute, whether or not parties request it. In doing this it must have some latitude not to comply with all requests to investigate further. Congress has afforded ITA considerable latitude and discretion in implementing the antidumping laws, especially during the investigative fair value phase. Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 929 (Fed. Cir. 1984).

The court is aware that the statute is intended to protect the domestic industry from unfair practices, but it seems highly unlikely that, as to the core investigatory aspect of this proceeding, any rights of Monsanto were trampled. Although the court is not clear from whence Monsanto's constitutional right to participate as opposed to statutory right to participate arises in this case, ITA would not ordinarily violate any such rights by not allowing access to verification exhibits or documentation of the type contained in verification exhibits. The verification exhibits which are not provided often involve the most detailed in-plant information. Obviously, ITA must balance the interest of the various parties and, at the same time, fulfill a statutory directive to promptly complete these investigations.

In order to encourage participation in the administrative proceedings by foreign producers, ITA does not generally allow access to verification documents as this would give competitors access to the most confidential type of material. That the court may allow access to such documents does not lead inevitably to the conclusion that ITA should release them. Parties are often more sanguine about the release of documents under court jurisdiction, with the resultant penalties if the privileges of access are abused. In any case, the court at this stage sees no reason to review in detail, and with hindsight, the question of whether the documents should have been provided as plaintiff did not raise that argument with the court at the time the confidential documents were denied. Plaintiff should not be permitted to wait and see whether the investigation comes out favorably and only then come forward, raise suspicions and challenge the investigation as inadequate because it did not have the documents it needed in order to raise particular questions at a particular administrative stage.

As indicated, the court has determined that plaintiff has not established that either the public or the confidential questionnaire responses were so inadequate as to deprive Monsanto of any rights. Thus, that Monsanto or ITA did not have a fuller response before verification is unavailing. Finally, Monsanto has demonstrated no injury which the court may remedy now that Monsanto's counsel

[18] In *Timken* v. *United States,* 10 CIT ——, ——, 630 F. Supp. 1327, 1333 (1986), the court recognized that certain statutory duties which went to the core of the investigation must be undertaken whether a party raises the issue or not.

has received further documentation and can formulate more particular arguments about what is might have said either before or after verification.

V. Circumstances of Sale Adjustment for Advertising

Plaintiff's final challenge concerns ITA's allowance to one producer, Shikoku, of a circumstances of sale adjustment for home market advertising expenses. Plaintiff specifically alleges that these expenses were not directly related to the merchandise under review,[19] and that these expenses were not directed to the ultimate end users of the merchandise—the customer of Shikoku's purchasers.[20]

Plaintiff's assertion that ITA cannot allow a circumstances of sale adjustment to Shikoku for advertising expenses because it has not shown those expenses to be directly related to *granular sales* in the swimming pool trade must be rejected.

As ITA noted in its final determination, none of Shikoku's advertising, for which an adjustment was allowed, was specifically directed to any particular form of CA or CD. 51 Fed. Reg. at 45,496. Initially in the investigation Shikoku submitted data to ITA allocating advertising expenses incurred for sales of CA & CD in granular and tablet form to both the swimming pool trade and septic tank industries over total home market sales of the same. CR 17 at 6. Wanting more specific data, ITA then requested and received data related to sales in the swimming pool trade. 51 Fed. Reg. at 45,496. Apparently this data yielded a yen per kilogram adjustment figure which could be applied to the volume of granular sales at issue.

The court finds this to be a proper method for allocating such expenses. As stated by our Court of Appeals, "[t]he presence of multiple products or institutional advertising in the same advertisement does not deprive the relevant portion of the advertisement of its direct relationship to the relevant sales." *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1581 (Fed. Cir. 1983). The presence of copies of advertisements containing pictures of tablets for septic tank use does not indicate that the adjustment made was based on such advertising. This advertisement no doubt related to Shikoku's rejected claim. Plaintiff has proffered no reasonable ground for rejecting the proportional allocation of advertising expenses covering several products, including the investigated product.

Plaintiff's second assertion, that the advertisements were not directed to end users of the merchandise, must also be rejected. ITA specifically requested that Shikoku provide samples of its advertising to the agency so that it might "identify the target for each advertising expense" CR 17 at 6. After examining the newspaper and magazine advertisements submitted, ITA "verified that these sam-

[19] Under ITA's regulations, circumstances of sale adjustments are "limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration." 19 C.F.R. § 353.15 (1987).

[20] 19 C.F.R. § 353.15 also specifies that "the assumption by a seller of a purchaser's advertising or other selling costs" would be an example of a difference in circumstances of sale for which allowances may be made but that "[a]llowances generally will not be made for differences in advertising and other selling costs of a seller unless such costs are attributable to a later sale of the merchandise by a purchaser."

ples could be directed to the purchaser's customer and that the end user was correctly identified." *Id.*

Accordingly, the court finds the ITA's determination to be supported by substantial evidence and to be in accordance with law.

(Slip Op. 88–138)

MONSANTO CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, NISSAN CHEMICAL INDUSTRIES, LTD., ET AL., INTERVENORS

Court No. 87–05–00641

[Judgment for defendant.]

(Dated October 14, 1988)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart,* and *David Scott Nance*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Platte B. Moring, III*), Civil Division, United States Department of Justice, for defendant.

Graham & James (*Yasuhiro Hagihera, Dennis H. Oyakawa, Lawrence R. Walders* and *Joon Y. Kim*) for defendant-intervenor Nissan Chemical Industries, Ltd.

Weil, Gotshal & Manges (*A. Paul Victor* and *Douglas A. Nave*) for defendant-intervenors Shikoku Chemical Corporation and Mitsubishi Corporation.

OPINION

RESTANI, *Judge:* This matter is before the court on plaintiff's motion for judgment upon the administrative record pursuant to Rule 56.1 of the Rules of this Court. In this action, plaintiff challenges the Department of Commerce, International Trade Administration's (ITA) final results in the second administrative review of antidumping orders covering imports of cyanuric acid and its chlorinated derivatives (CA & CD) from Japan. *Cyanuric Acid and its Chlorinated Derivatives from Japan Used in the Swimming Pool Trade,* 52 Fed. Reg. 15,970 (May 1, 1987).[1]

The challenged administrative review covers two Japanese manufacturers of CA & CD exported to the United States and the period April 1, 1984 through March 31, 1985. ITA found weighted average dumping margins of zero percent for one manufacturer, Nissan Chemical Industries, Ltd., on the two subject products it exported to the United States—dichloro isocyanurates and trichloro isocyanuric acid. For the second manufacturer, Shikoku Chemicals Corporation, ITA arrived at margins of 0.18 percent for imports of cyanuric acid,[2] and zero percent for dichloro isocyanurates and trichloro isocy-

[1]On May 7, 1987, ITA published a notice correcting a relatively minor error in the text of this final determination. 52 Fed. Reg. 17,366.

[2]Since the margin for Shikoku's cyanuric acid is less than 0.5 percent, and therefore *de minimis* for cash deposit purposes, ITA required no cash deposits of estimated antidumping duties.

anuric acid. 52 Fed. Reg. at 15,971. The court recently has affirmed the results of the first administrative review. *Monsanto Co.* v. *United States*, 12 CIT ——, Slip Op. 88–137 (October 14, 1988) (Monsanto I).

As in *Monsanto I*, plaintiff raises a variety of arguments based on ITA's decision to calculate foreign market value based on sales of all granular CA & CD in the home market, although the class of merchandise on which duties are to be imposed is limited to CA & CD used in the swimming pool trade. The court finds its previous views, as expressed in *Monsanto I*, of plaintiff's arguments regarding identical merchandise, sales outside the ordinary course of trade and fictitious markets applicable here. As in *Monsanto I*, the court finds no basis for a circumstances of sale adjustment merely because of a price difference between swimming pool and nonswimming pool merchandise in the home market.

In this case, plaintiff also argued to ITA that packaging is a restriction within the meaning of 19 U.S.C. § 1677(14) (1982) and that therefore an adjustment to compensate for the restriction is warranted in calculating foreign market value.[3] Section 1677(14) provides that where restrictions are found to affect the market value of the merchandise, adjustments shall be made in calculating the price at which the merchandise is sold or offered for sale. As the court noted in *Monsanto I*, both the wording of the statute and its legislative history indicate that this provision is directed toward restrictions comprised of external conditions placed upon the use or disposition of merchandise by sellers that are accepted by the buyers, such as restrictions on resale. *See Monsanto I* at 11–12 (citing S. Rep. No. 1619, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Admin. News at 3498, 3500–03). Plaintiff has made no showing that the packaging here falls within the purview of section 1677(14). Furthermore, plaintiff has pointed to no evidence of record that particular types of packaging have any effect on the value of merchandise in the home market. Buyers may choose whatever form of the product or whatever package suits them, and packaging is not likely to be a restriction on knowledgeable institutional uses, as generally are involved here. ITA's determination that the sales were unrestricted is, therefore, based on substantial evidence and in accordance with law.

As to defendant-intervenor Shikoku Chemicals Corporation, the court adheres to its earlier views on the appropriateness of a circumstances of sale adjustment for advertising expenses. As the adjustment was given for advertising aimed at non-direct purchasers and ITA's allocation method is appropriate, ITA did not err in granting the adjustment. *See Monsanto I* at 21–22. Plaintiff correctly notes that ITA did not review the referenced advertisements in this review as it did in the earlier review. There is no newly

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[3]Although this issue was discussed in *Monsanto I*, plaintiff had not articulated this particular argument clearly at the agency level in that case.

presented factual reason for verification in this review. Plaintiff argues, however, that ITA had no discretion to refrain from conducting a verification of certain information relied on.

Section 618 of the Trade and Tariff Act of 1984, codified at 19 U.S.C. § 1677e (Supp. IV 1986), relieves ITA of the burden of conducting verification if verification occurred during either of the preceding two administrative reviews, unless good cause for verification is shown. Prior to the 1984 act, ITA was required to verify information submitted by a foreign manufacturer during a section 751 administrative review. *Al Tech Specialty Steel Corp.* v. *United States,* 6 CIT 245, 575 F. Supp. 1277 (1983), *aff'd* 745 F.2d 632 (Fed. Cir. 1984). The effective date of the amendment was October 30, 1984. *See* Pub. L. No. 98–573, § 626, 98 Stat. 2948, 3042–43 (1984).[4] Plaintiff argues that as to entries made prior to October 30, 1984, it is entitled to verification. The court rejects this argument. The amendment deals with procedure. After October 30, 1984, ITA was to follow the new procedure. Congress could not have intended the interpretation proffered by plaintiff which would require ITA to continue verification for entries made prior to October 30, 1984 but which would allow ITA not to verify data for subsequent entries during the same review period. ITA has properly interpreted the amendment as applying to its procedures after October 30, 1984.

Plaintiff also alleges in this case that an adjustment for English language brochures and promotional materials directed at U.S. sales should be made to U.S. price. Shikoku asserts that it uses English in promotional materials world-wide. ITA made no adjustment to U.S. price because it considered these expenses to be indirect selling expenses not directly attributable to the purchase price transactions at issue. *See* 19 U.S.C. § 1677a(d) (1982). There is nothing in the record to contradict ITA's conclusion, and its view of the law appears correct.

Plaintiff also objects to the circumstances of sale adjustment allowed Shikoku for certain rebates consisting of free samples of merchandise given to customers in the home market. In the previous administrative review, ITA verified these rebates and concluded that "[t]he free samples are a selling expense directly related to the sales under review and, therefore, an allowable deduction to foreign market value." 51 Fed. Reg. 45,495, 45,497. As no evidence was presented here indicating a new verification was necessary, the adjustment was appropriate.

In addition to the objections it made in the first review, plaintiff now challenges ITA's decision not to conduct an investigation in this review to determine if significant sales were at less than cost of

[4]Section 626 of title VI of Pub. L. 98–573, does provide for delayed implementation of the 1984 amendments with regard to certain provisions of the Tariff Act of 1930. The amendments to these specified provisions apply only with respect to investigations initiated by petition or by the administering authority on or after October 30, 1984. The verification provision is not one of the specified provisions. The 1984 Act specifies, instead, that amendments made to section 1677e are to take effect on the date of enactment—October 30, 1984. *See* note following 19 U.S.C. § 1671 (Supp. IV 1986).

production. As to defendant-intervenor Nissan, plaintiff presented evidence, which had it been new evidence, might have given ITA reason to conduct the requested investigation. The information, however, was the same information which was before the agency during the previous administrative review, and which caused ITA to conduct the below cost of production investigation at that time. That investigation was negative as to plaintiff's claim. ITA found nothing during the first review to warrant a reverification in that proceeding and plaintiff's claim as to reasons why a verification is necessary here are not significantly different. The court sustained ITA's decision not to reverify or further investigate plaintiff's charges in the first annual review, because the investigation was conducted properly. ITA's determination not to conduct another investigation as to Nissan in this case is sustained because plaintiff has produced no new data which would cause ITA to have reasonable grounds to suspect less than cost sales after already investigating this allegation the previous year and arriving at a negative result.

As to Shikoku, no particular allegations were made by plaintiff until it submitted its prehearing brief and no information was submitted that ITA did not have before it when it conducted the earlier cost of production ivestigations. Thus, as with Nissan, ITA had no reason to believe it should conduct the investigation anew. On their face, the cost of production questionnaire responses submitted during the review at issue did not show sales below cost and the previous investigation did not turn up errors in previous responses. Without new information, ITA had no reason to commence a new investigation into cost of production.

As in the prior case, plaintiff claims that the public versions of the respondents' questionnaire responses were inadequate. The court rejects this claim for several reasons. First, it is admitted that Nissan supplied a revised public version of its questionnaire response shortly after its original submission. Shikoku disputed plaintiff's contention of inadequacy and did not submit a revised version until some months later. Although ITA never took a clear position on whether the original submissions satisfied the applicable legal requirements, it obviously found the revised submissions adequate. 52 Fed. Reg. at 15,971.

Second, Nissan indicated that its revised public response did not include specific numerical data on price adjustments or on prices by form of product, because confidential information could be derived therefrom. Under 19 U.S.C. § 1677f(b) (1982) such a statement, if based on fact, would permit Nissan's action. Furthermore, Nissan permitted confidential disclosure of its proprietary information. *See* 19 C.F.R. § 353.28 (1987). Given the sensitivity of the information at issue, ITA properly balanced the various concerns of the parties. There is no absolute right to a public version of questionnaire responses containing ranged numerical data for all items of informa-

tion. This is an area where ITA may draw various conclusions about what should be revealed publicly. ITA's determination in this case was reasonable. ITA's determination that Nissan's public version was adequate is, therefore, sustained.

Third, as to Shikoku, plaintiff argues that it had a right to a public response containing ranged data for terms of sale and terms of payment. Shikoku contends the ranged data would reveal specific confidential data of great use to its competitors. ITA did not err in accepting this response. Shikoku did provide the data on a confidential basis. Similarly, Shikoku confidentially provided data on cost of production as well as providing public ranged data for various items relating to cost of production. The court need not reach issues dealing with cost of production data because no cost of production investigation was required.

Although ITA did not reverify information relied on or conduct a new cost of production investigation, the record indicates ITA thoroughly considered plaintiff's various arguments, made appropriate adjustments where it found those arguments sound and generally performed an adequate review. The determination of ITA is sustained.

(Slip Op. 88–139)

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–07–00853

[Motion for rehearing denied.]

(Dated October 14, 1988)

Barnes, Richardson & Colburn, (*Rufus E. Jarman, Jr.* and *Matthew J. Clark*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David. M. Cohen,* Director, Commercial Litigation Branch (*Platte B. Moring, III*), Civil Division, United States Department of Justice, for defendant.

MEMORANDUM OPINION

RESTANI *Judge:* Plaintiff's motion for rehearing with respect to the court's decision ordering remand dated May 4, 1988 is untimely.[1] The remand results were filed in early summer. Almost three months later the instant motion was filed. Granting of the motion where the remand results were filed nearly three months earlier would undermine the court's duty to resolve this case as promptly as possible.

[1] All relevant background is found in that decision, *Ipsco, Inc.* v. *United States,* 12 CIT ——, 687 F. Supp. 614 (1988).

Furthermore, plaintiffs misperceive the basis of the court's decision. There appears to be no disagreement that in order to calculate a rate of subsidization attributable to Ipsco's production of oil country tubular goods (OCTG) ITA must allocate the particular governmental grants at issue over all of Ipsco's production of steel goods. Because it is difficult ordinarily to determine how grants such as the ones at issue actually benefit recipients in any real economic sense, ITA generally uses a sales value based allocation methodology in calculating the rate of subsidization resulting from such grants. Plaintiffs assert that a weight-based method is better suited to this factual setting because the grants were used largely for improvement of basic steel production and the steel in turn is used by Ipsco to make products of varying value. Plaintiffs argue further that OCTG has more value added to the basic steel, in comparison to other Ipsco products, so that ITA's methodology unfairly affects Ipsco's subsidy rate.

The issue before the court was whether ITA acted reasonably in not adopting the weight-based methodology suggested by plaintiff. The court determined based on the record in this case that ITA was not unreasonable in using its value-based allocation methodology. Under plaintiff's theory of appropriate allocation, one would allocate based on the amount of steel utilized in producing Ipsco's various end products. The results, according to plaintiffs' theory, should demonstrate that ITA's methodology yielded unfairly skewed results. Ipsco in its prehearing brief to ITA, however, argued for a new formula utilizing end product tonnage not the tonnage of steel utilized. Neither the relevancy of plaintiffs' method nor any serious imbalance between an appropriate weight-based method and ITA's method was demonstrated by plaintiffs.[2] The similarities in the end results of even the two methodologies discussed by plaintiffs seems to indicate that ITA's methodology does not come close to the horrible examples cited by plaintiffs in their briefs. That the difference in end results has significance to the outcome of this case is irrelevant. What is relevant is that plaintiffs did not demonstrate a serious defect in ITA's relatively straightforward approach. Finding plaintiffs had not made out a credible case that ITA's approach resulted in an unfair allocation under plaintiffs' theory, the court saw no need to discuss defendants' other arguments.

Plaintiffs' motion for rehearing is denied.

[2] The ratio of OCTG sales values to overall sales value appears to differ less than ten percent from the OCTG weight to overall weight ratio. Plaintiff neither referred specifically to this comparison nor explained how such a comparison should be adjusted for yield factors or other variables.

(Slip Op. 88–140)

THE TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, CHINA NATIONAL MACHINERY & EQUIPMENT IMPORT AND EXPORT CORP. (CMEC), DEFENDANT-INTERVENOR

Court No. 87–06–00738

Before NICHOLAS TSOUCALAS, *Judge.*

[Commerce's final determination affirmed in part and remanded in part.]

(Decided October 18, 1988)

Stewart and Stewart, (*Eugene L. Stewart* and *Terence P. Stewart*) for plaintiff.

John R. Bolton, Assistant Attorney General; *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*Platte B. Moring, III*) for defendant.

Graham & James (*Lawrence R. Walders* and *Brian E. McGill*) for defendant-intervenor.

OPINION AND ORDER

TSOUCALAS, *Judge:* Plaintiff, a domestic manufacturer of tapered roller bearings (TRBs), challenges the final affirmative determination of the United States Department of Commerce, International Trade Administration (Commerce) in *Tapered Roller Bearings from the People's Republic of China; Final Determination of Sales at Less Than Fair Value,* 52 Fed. Reg. 19,748 (May 27, 1987), which resulted in an exclusion of a foreign exporter's TRBs from the scope of the antidumping finding. Plaintiff disputes this determination on several grounds: (1) Commerce improperly applied the constructed value over the price methodology and the "best information available rule"; (2) Commerce erroneously appraised several components of production costs from India, the comparable surrogate country, which led to significant understatement of foreign market value; and (3) Commerce violated procedural due process by using data on which plaintiff did not have an opportunity to comment. The matter is before the Court on plaintiff's motion for judgment on the administrative record.[1]

BACKGROUND

Commerce instituted an antidumping investigation which targeted two TRB exporters from the People's Republic of China (PRC): Premier Bearing & Equipment, Limited, and CMEC. Since the PRC is a state-controlled, non-market economy country, 19 U.S.C. § 1677b(c) (1982) requires Commerce to designate a non-state-controlled surrogate country in which the foreign market value of Chinese TRBs will be determined. In accordance with 19 C.F.R. § 353.8(b), Commerce initially considered Egypt, India, Indonesia,

[1]On June 24, 1987, this Court denied plaintiff's application for a preliminary injunction to restrain liquidation of entries exported by the excluded foreign manufacturer, China National Machinery & Equipment Import & Export Corporation (CMEC). *See Timken Co.* v. *United States,* 11 CIT ——, Slip Op. 87–82 (July 14, 1987). CMEC is the defendant-intervenor in the present action.

Morocco, Pakistan, Thailand, and the Philippines as possible comparable economic conduits. Of these, only India and Indonesia were found to manufacture TRBs. Administrative Record Document No. 21 [hereinafter A.R. Doc. ——]. Finding Indonesia unsuitable as a comparable economy, Commerce designated India as the comparable surrogate country to the PRC.[2]

Commerce then dispatched surrogate questionnaires to six Indian TRB producers. Only one company, which was negotiating a joint venture with plaintiff, responded. Commerce rejected that company's price information upon being informed that the Indian government would not verify the report. Commerce reasoned that in the absence of verification, the figures lacked the requisite indicia of reliability.

Plaintiff offered cost data from Argentina, Mexico, and Spain, urging Commerce to utilize the price methodology. Commerce rejected these submissions on the grounds that the countries have advanced economies which preclude corresponding comparison with the PRC. The production statistics plaintiff's Brazilian subsidiary voluntarily supplied were likewise rejected on the incommensurability of economies rationale and also because they were untimely.

Pursuant to 19 C.F.R. § 353.8(b)(1), Commerce adopted the constructed value methodology which calls for a calculation of the foreign market value of TRBs on the basis of assigning the designated surrogate country's costs to Chinese factors of production. In constructing value, Commerce utilized cost information acquired from both the Indian Steel Authority's publication *Statistics for Iron and Steel Industry in India* and the U.S. Consulate in Bombay, India. To ascertain the Chinese factors of production, Commerce verified the PRC's manufacturing process through on-site inspections. A.R. Doc. 113. The Consulate's data, which Commerce relied on as the "best information otherwise available," were unverifiable due to the Indian government's lack of participation. On May 27. 1987, Commerce made a final affirmative determination that tapered roller bearings from the PRC were being sold in the United States at less than fair value, but found no dumping margin for CMEC. 52 Fed. Reg. 19,748.

Plaintiff claims that the statutory and the regulatory foreign market value provisions involved advance prices over constructed value, compelling Commerce to first use the price information from India, Brazil, Argentina, Mexico, and Spain. Plaintiff further contends that statutory verification provision 19 U.S.C. § 1677e (1982 & Supp. IV 1986), requires an exhaustion of verifiable data in the petition before utilizing the designated comparable surrogate's unverified figures as the "best information otherwise available."

Plaintiff also alleges that substantial evidence in the record does not support Commerce's calculation of the net raw material cost

[2]Commerce eliminated Indonesia as a possible comparable surrogate since the only bearing manufacturer in Indonesia "carried on a great deal of business with Eastern Bloc countries and additionally had not proved to be cooperative in other business dealings with the [U.S.] [E]mbassy [in Jakarta]." A.R. Doc. 37.

and the factory overhead. Lastly, it is plaintiff's position that it was denied due process because it was not provided with an opportunity to comment on one telex Commerce received from the U.S. Consulate eight days before publication of the final determination.

DISCUSSION

A. *Foreign Market Value*

The governing statutory provision for determining foreign market value states in pertinent part:

(c) State-controlled economies

> [T]he administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by *either*—
>
> (1) *the prices* * * * at which such or similar merchandise of a non-State-controlled-economy country or countries is sold * * *
>
> (A) for consumption in the home market of that country or countries, or
>
> (B) to other countries, including the United States; or
>
> (2) *the constructed value* of such or similar merchandise in a non-State-controlled-economy country or countries * * *

19 U.S.C. § 1677b(c) (emphasis added). It is obvious from the use of the disjunctive that Commerce has the discretion to use *either* prices *or* constructed value when computing foreign market value for state-controlled economies. Plaintiff's claim that Commerce is statutorily mandated to employ prices from India, Brazil, Argentina, Mexico, and Spain is patently contrary to the clear language of the statute. "[F]ailure to use a discretionary alternative method does not constitute error when the agency uses a lawful second method." *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 525, 622 F. Supp. 1071, 1076 (1985) (citing *Zenith Radio Corp.* v. *United States,* 9 CIT 110, 113, 606 F. Supp. 695, 698 (1985), *aff'd,* 783 F.2d 184 (Fed. Cir. 1986)). The Court therefore finds Commerce acted in accordance with the statute in adopting the constructed value methodology based on the Indian data.

Plaintiff argues that commerce was otherwise required by its own regulations to utilize prices over the constructed value, citing subsection (a) of 19 C.F.R. § 353.8:

> (a) *In general* * * * foreign market value shall be determined on the basis of the normal costs, expenses, and profits as reflected *in order of preference by either*:
>
> (1) *The prices* * * *; or
>
> (2) *The constructed value* of such or similar merchandise in a non-state-controlled-economy country, * * * (emphasis added).

While section 353.8(a) states an order of preference for prices, it is nevertheless subordinate to the hierarchical order contained in subsection (b) on the comparability of economies:

> (b) *Comparability of economies.* (1) *The prices* as determined under paragraph (a)(1), *or the constructed value* as determined under paragraph (a)(2), *shall be determined,* to the extent possible, *from* the prices or costs in a non-state-controlled-economy *country or countries at a stage of economic development comparable to the state-controlled-economy country* * * *
>
> (2) *If no non-state-controlled economy country of comparable economic development can be identified,* then the *prices or constructed value* as determined from another non-state-controlled-economy country or countries other than the United States shall be used * * * (emphasis added).

Subsection (b)(1) provides that the "prices * * * or the constructed value * * * shall be determined" from a comparable non-state-controlled economy. Subsection (b)(2) likewise directs Commerce to utilize "prices or constructed value" from a non-comparable economy "[i]f no non-state-controlled economy country of comparable economic development can be identified." The incorporation by reference of section 353.8(a) into subsections (b)(1) and (b)(2) clearly establishes the resolution of comparability of economies as a condition precedent to adopting either price or constructed value methodology pursuant to section 353.8(a). Any other interpretation, such as plaintiff insists, not only subverts the order of preference for comparable economies expressly contained in section 353.8(b), but renders superfluous the references to section 353.8(a) in both subsections (b)(1) and (b)(2). Thus, the "preference" for prices under section 353.8(a) becomes applicable only subsequent to a designation of a comparable surrogate country.[3]

Recognizing this order, *Chemical Products Corp.* v. *United States,* 10 CIT ——, 645 F. Supp. 289 (1986) (*Chemical Products I*), held that "Commerce may consider the comparability of economies before it determines whether to employ prices or constructed value as a means of determining foreign market value." *Id.* at ——, 645 F. Supp. at 293. Plaintiff in *Chemical Products I,* like the one herein, maintained that where an investigation involves a respondent from a state-controlled-economy country, section 353.8 demands an application of prices from non-comparable economy rather than the constructed value in designated comparable surrogate. In rejecting this argument, the court emphasized that the underlying statutory purpose of arriving at the most accurate foreign market value necessitates effectuation of the comparability principle. *Id.*

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[3]Plaintiff's erroneous contention that the term "preference" mandates Commerce to utilize prices, including ones from non-comparable countries, appears to stem from the regulation's distinct arrangement in which section 353.8(a) sequentially precedes section 353.8(b). Notwithstanding this structure, the regulation, read as a whole, establishes the preeminent position of the comparability formula.

Consistent with the centrality of the comparability formula under the regulation, Commerce is directed to construct value in the designated comparable surrogate even when price data are obtainable from non-comparable countries. As illustrated, section 353.8(b)(2) provides that Commerce "shall" use information obtained from non-comparable countries only when a comparable alternate "can[not] be identified." § 353.8(b)(2). It is uncontroverted that India was properly designated as the PRC's comparable alternate under section 353.8(b). Moreover, plaintiff neither disputes Commerce's finding that Brazil, Argentina, Spain, and Mexico do not have commensurable economies nor presents any novel claim meriting departure from *Chemical Products I.* While Commerce may avail itself of data from a country other than the designated conduit, adoption of such an inter-surrogate methodology represents a departure from the norm and remains within the scope of Commerce's discretionary power. *Chemical Prods. Corp.* v. *United States,* 10 CIT ——, 650 F. Supp. 178 (1986) (*Chemical Products II*). Plaintiff's proposition that figures from the above-enumerated non-comparable countries should have been utilized would unlawfully divest Commerce of its authority by inaugurating as a rule, rather than as a means to be employed at Commerce's discretion, the obligatory use of data from an unspecified number of additional countries whenever such information is made available. *Id.*

Plaintiff's alternative claim that the regulation compels Commerce to use the prices plaintiff's Indian business partner provided is based on a misperception of the thrust of "preference" in section 353.8(a). The term does not connote an absolutely binding prescription, but serves as a directive guidance to which Commerce should adhere to the extent that it promotes the fair and effective administration of the complex and intricately interwoven antidumping law. *See Chemical Products I,* 10 CIT at ——, 645 F. Supp. at 292. The application of the regulation is a fluid process tailored, within the bounds of Commerce's reasoned judgment, to the unique set of facts of each investigation. *See China Nat'l Metals & Minerals Import & Export Corp.* v. *United States,* 11 CIT ——, 674 F. Supp. 1482 (1987). In the present case, the possibility of verifying the figures plaintiff's joint venturer supplied was foreclosed by the Indian government's non-participation. Under these circumstances, Commerce was justified in rejecting data obtained therefrom on grounds of lack of requisite indicia of reliability and adopting the constructed value approach.

B. *Verification*

The remaining methodological dispute is whether Commerce is precluded from using unverified data from India as the "best information otherwise available" until it has exhausted the verifiable data in the petition. Plaintiff contends that once the Indian government declined participation in the verification effort, Commerce

was obliged to use the data from the non-comparable economies of Brazil, Argentina, Mexico, and Spain. In seeking to substantiate its claim, plaintiff advances that the reliability goal underlying the verification provision preempts the comparability of economies determination.

The contested portions of 19 U.S.C. § 1677e provide:

> **(a) General rule**
>
> The administering authority shall verify all information relied upon in making —
>
> (1) a final determination in an investigation,
>
> * * * * * * *
>
> * * * If the administering authority is unable to verify the accuracy of the information submitted, it shall use the *best information available to it* as the basis for its action * * *.
>
> **(b) Determination to be made on best information available**
>
> [W]henever a party or any other person refuses or is unable to produce information requested *in a timely manner* and *in the form required*, or otherwise significantly impedes an investigation, use the best information otherwise available. (Emphasis added).

While the imperative "shall" under section 1677e(a) appears to mandate Commerce to verify all data on which it relies, the "best information otherwise available rule" is exempted from its scope. *See also Ansaldo Componenti* v. *United States*, 10 CIT ——, 628 F. Supp. 198 (1986). In addition, the "best information rule" is broadly enunciated under section 1677e(b). Congress therefore contemplated giving Commerce wide latitude in applying the verification provision to allow it to adapt rapidly to the myriad of circumstances that it faces in the daily administration of the antidumping law. In other words, the verification requirement is admittedly a measure adopted to ensure that Commerce uses reliable data in making its determinations, but its juxtaposition with the "best information rule" attests that the provision is concerned with an equally compelling objective: the expeditious conclusion of investigations.[4]

By advancing the verification goal to the exclusion of the competing obligation on Commerce to make timely determinations, plaintiff improperly seeks to impose an unwarranted intermediary step between Commerce's verification efforts in the designated surrogate and the triggering of the "best information rule." *See Atlantic Sugar*, 744 F.2d at 1561. Directing Commerce to shift the surrogate situs whenever a properly designated economic conduit declines cooperation and verifiable production data become available from other

[4] "[A] major objective of this revision of the antidumping duty law is to reduce the length of an investigation." S. Rep. No. 249, 96th Cong., 1st Sess. 98, *reprinted in* 1979 U.S. Code Cong. & Admin. News 467. *See also Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556 (Fed. Cir. 1984).

countries would protract investigations, thereby defeating the purpose of the "best information rule."

To the extent the verifiable data in the petition are from noncomparable countries, plaintiff's contention that Commerce was required to utilize them on its theory that the verification concern precedes the determination of the comparability issue contravenes the judicial standard for reviewing an agency's construction of the law. In the absence of clear language to the contrary, Commerce's interpretation will be sustained in accordance with the current congressional expectation of deferring to the special expertise of Commerce in administering the antidumping law. *See Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978) (citations omitted). The "best information available" clause does not link tis accessibility with the comparability formula. It was thus fully within Commerce's discretionary power to determine the order of investigatory procedure between verification and the resolution of the comparability question.

While the verification consideration promotes the overall goal of equitable administration of the law, it cannot be said that the comparability principle does not equally contribute to this end. Extensive verification attempts to ensure reliability are meaningless unless they aid in the appraisal of the most precise foreign market value possible.

In this connection, the nexus between the nature of information to be verified and the end towards which they are verified is essential "to guarantee that the administering authority makes the fair value comparison on a fair basis — comparing apples with apples." *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1983). It is thus permissible for Commerce to employ unverified data from the designated surrogate as the "best information otherwise available," absent serious defect in the comparable surrogate selection process or *Commerce's* prejudicial error in conducting verification. Plaintiff neither challenges Indcia's status as a comparable surrogate nor argues that Commerce failed to make verification attempts in India. The Court finds therefore that Commerce was justified in adopting the unverified Indian data as the "best information otherwise available."

In effect, plaintiff's contention regarding the order of prior investigatory procedure is a demand for an exhaustive standard of investigation that was soundly rejected in *Atlantic Sugar.* The court stated that "[w]hile it may be true that the ITC staff might have been more aggressive in pursuing [more detailed data] * * * we are not here reviewing the ITC's diligence. *Nothing in the best information rule or its legislative history defines a standard of investigative thoroughness.*" *Id.* at 1561 (emphasis added). The court went on to state that to the extent the administering agency's diligence is relevant, it relates only to the issue of determining the question of the sub-

stantiality of the evidence. *Id.* Similarly, *Seattle Marine Fishing Supply Co.* v. *United States*, 12 CIT ——, 679 F. Supp. 1119 (1988), *appeal docketed*, No. 88–1485 (Fed. Cir. July 1, 1988), pointed out that the issue is not what information becomes the "best information otherwise available," but whether or not substantial evidence exists in the record to support Commerce's findings.

C. *Substantiality of Evidence*

The next question to be resolved then is whether substantial evidence on the whole record supports Commerce's determination. Substantial evidence is relevant evidence that a "reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co.* v. *United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citing *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938)). The "whole record" means that the Court must consider both sides of the record. It is not sufficient to merely examine the evidence that sustains the agency's conclusion. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

In conformity with the breadth of legislative trust in the administering authority's expertise, however, any judicial review of the agency determination is a limited one. It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record. *Matsushita*, 750 F.2d at 933 (citing *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966)).

Plaintiff first alleges that Commerce's reliance on discrete sources of information when appraising the net raw material cost of manufacturing TRBs resulted in a figure that the record on a whole does not support. To calculate the net raw material cost, Commerce needed to subtract from the total cost of steel input the value of scrap steel recovered from the TRB production process. In arriving at the total cost of bearing quality steel bar used in the Chinese TRB production, Commerce used Indian merchant quality steel bar prices listed in the Steel Authority of India's publication *Statistics for Iron and Steel Industry in India*, adjusted to account for quality differences between the bearing and merchant grades of steel. 52 Fed. Reg. at 19,749. When offsetting raw material costs to reflect savings from scrap, Commerce used another source, namely, two telexes from the U.S. Consulate in Bombay, India. A.R. Docs. 98,130.

Commerce asserts that *Chemical Products II* approved such utilization of information.[5] That case is inapposite for several reasons. Unlike the situation therein, which resulted in an enmeshing of information from two surrogates to avert an "unrealistic" foreign market value estimation, *id.*, the instant case involves two telexes

[5] In *Chemical Products II*, the court sustained the use of the Brazilian figures to value the cost of transportation, notwithstanding designation of Thailand as the PRC's comparable surrogate, reasoning that reliance on such data is a proper alternative if Commerce "finds that a comparison of one element of foreign market value in the surrogate would yield an unrealistic result." *Id.* at ——, 650 F. Supp. at 182.

whose inconsistency is laid bare when used in conjunction with the raw material prices listed in the Steel Authority of India's *Statistics for Iron and Steel Industry in India.*

More specifically, one telex lists prices for various types of steel tubes and rings and states that, "[e]x mill price of steel scrap is rupees 8 to 10 per Kg." A.R. Doc. 98. A subsequent telex repeats the same price-specific scrap value and also provides a more general figure in ratio of raw material cost to scrap worth: "Prices of scrap are generally twenty percent of material cost." A.R. Doc. 130. Commerce's scrap value calculations based on the price-specific information, together with the quoted steel prices in *Statistics for Iron and Steel Industry in India,* yielded a scrap value that is 75.2% of material cost. *Memorandum of Points and Authorities in Support of Plaintiff's Motion for Judgment on the Agency Record* at 16 [hereinafter *Plaintiff's Memorandum*].

Such inconsistent results did not occur in *Chemical Products II.* That court affirmed Commerce's finding on grounds that "the Court must give 'tremendous deference' to the agency administering the antidumping law" and that Commerce adequately explained the reasonableness of its action. *Id.* at 182 (citing *Smith-Corona Group,* 713 F.2d at 1581). In the present action, Commerce provides no contemporaneous rationale for concluding that one cost quotation in the telex is more appropriate than the other. The final calculation worksheets merely state that, "[p]er Bombay * * * the scrap price (ex-mill) in India was 8 to 10 rupees per kilogram as of March 10, 1987. As this price was obtained from a bearing manufacturer, it is assumed that the price is for bearing quality steel scrap." A.R. Doc. 132.

The only reference to the inconsistent figures appears in Commerce's brief.[6] Commerce explains, in a conclusory manner without relating to any evidence in the record, that the twenty percent figure "undoubtedly" refers to the ratio for expensive raw materials used by the Indian producers to the low value scrap generated. *Id.* at 23. In a similar fashion, Commerce states that the higher 75.2% ratio is reasonable since less costly Chinese raw materials yield scrap with high resale value. Both rationales are unsatisfactory. Commerce's assumption that the price-specific figure in the disputed telex refers to bar-generated scrap is invalid. The record indicates that all Indian companies are "using steel tubes and forged rings or roll rings as a substitute for round steel bars." A.R. Doc. 98. Commerce thus failed to provide persuasive justification for its conduct.

Invoking the "best information rule" in investigations targeting non-market economies does not discharge Commerce's responsibili-

[6] "Faced with specific price information * * * and more general information regarding the relationship between the price of scrap and the cost of raw materials, Commerce decided to use the average of the specific prices noted in the two cables, or 9 rupees per kilogram, as the best information available." *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon Agency Record* at 22 [hereinafter *Defendant's Memorandum*].

ty of contemporaneously explaining its probative findings. The need for a coherent articulation of its conclusions becomes more urgent in a "best information" context so that the reviewing court may thoroughly consider the circumstances surrounding Commerce's findings. The Court remands this issue so that the mutual inconsistency in the disputed telexes may be resolved by using, to the extent possible, both the raw material prices and the scrap value quoted in the telexes from the U.S. Consulate, adjusted to account for different grades and types of steel input and the kind of scrap the Indian and Chinese TRB companies manufacture.

Plaintiff also raises objections to Commerce's calculation of the factory overhead. Plaintiff insists that insofar as Commerce relied on two telexes obtained from the U.S. Consulate, Commerce had no evidence on which to base its overhead findings. One telex provides the total cost of TRB production, including the overhead, A.R. Doc. 126, and the other clarifies the list, but at the same time states, "[w]e are not able to provide information on factory overhead expenses as it is not available to us." A.R. Doc. 130. Commerce explains that it proceeded under the reasonable assumption that the controverted statement only expresses the Consulate's inability to quantify specifically the figures in the first telex. The administrative record supports Commerce's rationale in that the second telex was transmitted only after Commerce's numerous requests for a clarification of the first one. A.R. Docs. 128 and 129. In these circumstances, the Court finds that Commerce could reasonably conclude that the statement was not a disclaimer as to the validity of the preceding telex, but was only a reply to Commerce's repeated appeals for a clarification.

Plaintiff further maintains that even if Commerce could consider the telexes as evidence, they are insufficient to support Commerce's finding. It alleges that deducing overhead from two general categories, "depreciation" and "other expenses," out of the six enumerated in the telex reflecting the entire production cost, was improper since they may not encompass all overhead expenses. Plaintiff cites previous investigations involving India which, according to plaintiff, demonstrate Indian companies' irregular accounting practices.

Plaintiff's challenge rests on the unsubstantiated assumption that the "depreciation" and the "other expenses" categories do not fully reflect overhead expenditure. In the investigations plaintiff summoned to support its argument, the Indian companies' aberrant record-keeping procedure was successfully challenged because the evidence in the records contained glaring accounting errors. *See e.g., Certain Iron Construction Castings from India; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 9486 (March 19, 1986) (reclassifying warehouse maintenance, repairs, maintenance and depreciation as factory overhead). In the present case, there is no evidence to this effect. Commerce explains that it deduced from the telexes the two categories which, from its past experience, fairly

reflected the overhead outlay. *Defendant's Memorandum* at 27–28. Given the absence of any evidence to the contrary, the Court upholds Commerce's overhead findings.

Similarly, the Court cannot sustain plaintiff's alternative allegation that Commerce erred by not adjusting the overhead upward to account for additional expenses necessary in manufacturing TRBs from bars, as opposed to tubes. Commerce could not have reasonably made the overhead adjustments that plaintiff requests from the evidence contained in the record. While the additional heating and hot-forming step in the bar-based manufacturing process may raise overhead through higher fuel consumption, the tube-based manufacturing process' extra green machining step may lead to a corresponding result. A.R. Doc. 116; *Plaintiff's Memorandum* at 37–39; *Defendant's Memorandum* at 32.

The Court observes no legitimate basis in plaintiff's argument that Commerce was required to consider the higher overhead figures for the United States, Japanese, and Brazilian TRB manufacturers. *Freeport Minerals Co.* v. *United States,* 776 F.2d 1029 (Fed. Cir. 1985), has been conspicuously miscited by plaintiff to support its claim that the "market conditions, prices, and the performance of other companies in the product market are relevant to whether [Commerce's] final decision is a reasonable one." *Plaintiff's Memorandum* at 43. A cursory reading of *Freeport* reveals that the opinion noted other companies' business standing only as a background factual matter.[7] Plaintiff's assertion is further without merit because it calls for a comparison of the developed economies' capital-intensive production process with India's labor-intensive method.

Lastly, Commerce concedes that its inadvertent exclusion of excise tax from the Chinese raw material cost, while including it in calculating the Indian overhead, led to a 2.98% undervaluation of the Chinese overhead. Therefore, this Court directs Commerce to consider the upwardly adjusted overhead in conjunction with the recomputed net cost of raw materials to determine whether they alter the negative antidumping duty margin found for CMEC.

D. *Due Process*

The standard governing the interested parties' access to information under the statute states that, "[t]he administering authority and the Commission shall, from time to time upon request, inform the parties to an investigation of the progress of that investigation." 19 U.S.C. § 1677f(a)(2) (1982). The legislative history clarifies that an obligation on the administering authority to maintain a record is "for purposes of judicial review," and that the participating parties' right is to be "more fully aware of the presentation of information

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[7] The court held that the administering authority must base its revocation of an affirmative antidumping order on updated data. *Id.* at 1031.

to the Authority or the ITC." H.R. Rep. No. 317, 96th Cong., 1st Sess. 77.

Therefore, plaintiff's claim that its due process rights were violated because it did not have an opportunity to comment on one telex that Commerce received shortly before the issuance of the final determination is without merit. The record is replete with evidence of plaintiff's involvement in the investigation through active correspondence with Commerce; it received and submitted data on contested matters, participated in public hearings, and filed briefs. In view of the foregoing, the Court concludes that plaintiff received adequate procedural rights.

CONCLUSION

Upon review of the administrative record, this Court finds that Commerce correctly adopted the constructed value methodology and properly applied the "best information available rule." The Court also sustains Commerce's appraisal of the foreign market value, except with regard to its computation of the net raw material cost and disparate tax treatment. The Court does not find any due process violation. Commerce shall make the necessary adjustments consistent with this opinion and file with the Court within forty-five days a supplemental record explaining its redetermination. Plaintiff will respond to the results on remand within fifteen days from the date of Commerce's filing of its redetermination. Thereafter, defendant has ten days to submit any reply to plaintiff's comments.

SO ORDERED.

ABSTRACTED VALUATION

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	
V88/57	Watson, J. September 26, 1988	Global Trading Inc.	83-1-00076	Export value	Appra any appr pric plai sche and
V88/58	Watson, J. September 26, 1988	Sultra Corp.	85-10-01471	Transaction value	$39.25 dzn.
V88/59	Watson, J. September 29, 1988	A.N. Deringer, Inc.	86-3-00379	Transaction value	Unit p com net,
V88/60	Watson, J. September 29, 1988	Texas Instruments, Inc.	82-5-00701	Constructed value	61.933 of a 807.

ON DECISIONS

HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
raised values, less 50% of y amount by which the praised values exceed the ice actually paid by aintiff as set forth on hedule attached to decision d judgment	Agreed statement of facts	Laredo Strawberries, etc.
25 per dzn. or $31.10 per n.	Agreed statement of facts	New York Not stated
price listed on mmercial invoices, $4.23, t, packed	Agreed statement of facts	Ogdensburg Fire extinguishers
33% of entered value (net all allowances under item 7.00)	Agreed statement of facts	Dallas Semiconductor devices

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United States *v.* Stavros Angelaxos & American Motorists Insurance Co., 12 CIT ——, Slip Op. 88–73 (June 7, 1988), *appeal docketed,* No. 88–1503 (Fed. Cir. July 20, 1988).

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